

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19⁶⁰

No. 325

INTERSTATE COMMERCE COMMISSION, THE AMERICAN FORWARDING COMPANY, ET AL., APPELLANTS,

v.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, THE WABASH RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, AND THE BALTIMORE & OHIO RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 11, 1960.

(21820)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 594.

INTERSTATE COMMERCE COMMISSION, THE AMERICAN FORWARDING COMPANY, ET AL., APPELLANTS,

VS.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, THE WABASH RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, AND THE BALTIMORE & OHIO RAILROAD COMPANY.

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1 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York in the Second Circuit, greeting:

Writ of error.

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of the United States for the Second Circuit and Southern District of New York before you or some of you, between the Delaware, Lackawanna and Western Railroad Company, The Wabash Railroad Company, The New York, Chicago & St. Louis Railroad Company, The Baltimore & Ohio Railroad Company, and the Interstate Commerce Commission, The Export Shipping Company, Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants, The American Forwarding Company, Transcontinental Freight Company, and Rockford Manufacturers and Shippers' Association, a manifest error hath happened to the great damage of the said Interstate Commerce Commission, The American Forwarding Company, Transcontinental Freight Company, Rockford Manufacturers and Shippers' Association as by their complaint appears. We being

willing that error, if any hath been, should be duly corrected
2 and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein given that then under your seal and distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the 22 day of June, in the year of our Lord, 1909.

[SEAL.]

JOHN A. SHIELDS,

Clerk of the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

Allowed by the U. S. Circuit Judge for the Second Circuit.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from 5 to 775, contain a true and complete transcript of the record 3 and proceedings had in said court, in the cause of The Delaware, Lackawanna and Western Railroad Company, The Wabash Railroad Company, The New York, Chicago & St. Louis Railroad Company, and The Baltimore and Ohio Railroad Company, complainants, vs. Interstate Commerce Commission, The Export Shipping Company, and Edward B. Boise, as Trustee in Bankruptcy of The Export Shipping Company, defendants, and The American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, interveners, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 11th [SEAL.] day of August, in the year of our Lord one thousand nine hundred and nine, and of the independence of the United States the one hundred and thirty-fourth.

JOHN A. SHIELDS, Clerk

4 (Indorsed:) (Original.) Form No. 336. U. S. Circuit Court, Southern District of New York. The Delaware, Lackawanna & Western R. R. Co. et al., complainants, versus Interstate Commerce Com. et. al., and the Amer. Forwarding Co. et al., interveners. Writ of error. Henry A Wise, United States Attorney, Attorney for .

Due service of a copy of the within is hereby admitted. New York, June 14, 1909. William S. Jenney, Douglas Swift, Attorney for Complainants.

U. S. Circuit Court, Southern District, N. Y. Filed June 22, 1909.
John A. Shields, Clerk.

5 *The President of the United States of America, to Interstate Commerce Commission, The Export Shipping Company and Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company, greeting:*

[L. S.]

You are hereby commanded that you and each of you personally appear before the judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in equity, on the first Monday of December, A. D. 1908, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by The Delaware, Lacka-

wanna and Western Railroad Company, The Wabash Railroad Company, The New York, Chicago & St. Louis Railroad Company, and The Baltimore & Ohio Railroad Company, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, the honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the city of New York, on the 15th day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States of America the one hundred and thirty-third.

JOHN A. SHIELDS, *Clerk.*

WILLIAM S. JENNEY and
DOUGLAS SWIFT,
Solicitors for Complainants.

6 The defendants are required to enter appearance in the above cause, in the clerk's office of this court, on or before the first Monday of December, 1908, or the bill will be taken pro confesso against them.

J. A. S., *Clerk.*

I hereby certify that on the 19th day of October, 1908, at the city of New York, in my district, I personally served the within subpoena in equity upon the within-named defendant, Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company by exhibiting to him at 59 Wall street, N. Y. City, the within original, and at the same time leaving with him a copy thereof.

I hereby further certify that on the 19th day of October, 1908, at the city of New York, in my district, I served the within subpoena in equity upon the within-named defendant The Export Shipping Company by exhibiting to Albert A. Bailey, as secty. & treas. of The Export Shipping Co., at Tombs Prison, cor. Franklin & Centre str., N. Y. City, the within original, and at the same time leaving with him a copy thereof.

W.M. HENKEL,
United States Marshal, Southern District of New York.

Dated Oct. 19, 1908.

Summoned defendant Interstate Commerce Commission by service on E. A. Moseley, secretary, personally.

October 16th, 1908.

AULICK PALMER,
U. S. Marshal, D. C.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Oct. 19, 1908. John A. Shields, clerk.

7 *Bill of complainant.*

In the Circuit Court of the United States, for the Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, The Wabash Railroad Company, The New York, Chicago & St. Louis Railroad Company, and The Baltimore & Ohio Railroad Company, complainants,

vs.

In equity. October term, 1908. No. .

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, and Edward B. Boise, as Trustee in Bankruptcy of the Export Shipping Company, defendants.

To the Judges of the Circuit Court of the United States, for the Southern District of New York:

The Delaware, Lackawanna and Western Railroad Company, a corporation created by and existing under the laws of the State of Pennsylvania, The Wabash Railroad Company, a corporation created by and existing under the laws of the States of Ohio, Indiana,

Illinois, Michigan and Missouri, The New York, Chicago & St. Louis Railroad Company, a corporation created by and existing under the laws of the States of New York, Pennsylvania, Ohio and Indiana, and The Baltimore & Ohio Railroad Company, a corporation created by and existing under the laws of the State of Maryland, bring this their bill against the Interstate Commerce Commission, a body created and established by and existing under and by virtue of various acts of Congress of the United States, The Export Shipping Company, a corporation created by and existing under the laws of the State of New Jersey, and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, and thereupon your orators complain and say:

1. That your orator, the Delaware, Lackawanna and Western Railroad Company, is and was at all the times herein mentioned, a corporation duly created by and existing under the laws of the State of Pennsylvania, having its principal place of business and its principal operating office in the Borough of Manhattan, city of New York, within the Southern District of New York. Your orator, the Wabash Railroad Company, is and was at all the times herein mentioned a corporation duly created by and existing under the laws of the States of Ohio, Indiana, Illinois, Michigan and Missouri, having its principal place of business and its principal operating office in the city of St. Louis, Missouri. Your orator, the New York, Chicago & St. Louis Railroad Company, is and was at all the times herein

mentioned, a corporation duly created by and existing under the laws of the States of New York, Pennsylvania, Ohio and Indiana, having its principal place of business and its principal operating office in the city of Cleveland, Ohio. Your orator, the Baltimore & Ohio

9 Railroad Company, is and was at all the times herein mentioned a corporation duly created by and existing under the laws of the State of Maryland, having its principal place of business and its principal operating office in the city of Baltimore, Maryland. Each of your orators is and was at all the times herein mentioned, a common carrier, engaged in the interstate transportation of passengers and property by railroad as follows: The Delaware, Lackawanna and Western Railroad Company between points in the States of New York, Pennsylvania and New Jersey; The Wabash Railroad Company between points in the States of New York, Michigan, Indiana, Illinois, Missouri, Iowa, Ohio and Pennsylvania; The New York, Chicago & St. Louis Railroad Company between points in the States of New York, Pennsylvania, Ohio, Indiana and Illinois, and The Baltimore & Ohio Railroad Company between points in the States of New York, New Jersey, Pennsylvania, Delaware, Virginia, West Virginia, Ohio, Indiana, Illinois, Kentucky, Missouri and the District of Columbia.

In respect to such interstate transportation of passengers and property, each of your orators is subject to the act of Congress entitled "An act to regulate commerce," passed by Congress and approved February 4th, 1887, and acts amendatory thereof and supplementary thereto, in so far as the same are constitutional.

2. That the Interstate Commerce Commission is a Commission created and established, and now existing, under and by virtue of various acts of the Congress of the United States.

3. That the Export Shipping Company is and was at all the times herein mentioned, a corporation duly created by and existing under the laws of the State of New Jersey, having its principal office 10 and place of business in the city of New York. On the 18th day of May, 1908, and subsequent to the commencement of the actions against your orators before the Interstate Commerce Commission, hereinafter referred to, a petition in involuntary bankruptcy was duly filed against said corporation in the District Court of the United States for the Southern District of New York, and on the 3d day of August, 1908, by an order then duly made by said court and filed in the office of the clerk of said court, the said Export Shipping Company was adjudicated a bankrupt. On the 2d day of September, 1908, Edward B. Boise was duly appointed trustee of said bankrupt's estate, and on the 8th day of September, 1908, qualified as such trustee by filing his bond with the clerk of said court. On the 17th day of September, 1908, an order was duly made by said court, and filed with the clerk thereof, authorizing your orators to join the Export Shipping Co. and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Co., as defendants in this action.

4. That each of your orators is engaged as a common carrier, in the interstate transportation of property within what is known as Official Classification territory, which is the territory of the United States east of the Mississippi River and north of the Potomac and Ohio rivers. The freight tariffs of your orators, duly published and filed with the Interstate Commerce Commission, pursuant to the said act to regulate commerce, as amended, and effective throughout the said Official Classification territory, provide and have for several years past provided, in the case of a large majority of the articles transported by your orators, lower freight rates for carload shipments of said articles than for less than carload shipments of the same articles, subject, however, to the provisions of rules 5-B and note and 15-E and note, hereinafter quoted.

11 In respect to the transportation of freight between points within said Official Classification territory, your orators are, and for several years past have been, subject to and governed by the provisions, rules, and regulations of the Official Classification, a tariff duly published and filed by your orators with the Interstate Commerce Commission, pursuant to the said act to regulate commerce, as amended, which tariff contains the classification of freight and certain rules and regulations governing the classification and transportation of freight within the said Official Classification territory. Said Official Classification contains, among others, the following rules, designated therein as Rule 5-B and note, and Rule 15-E and note, which have been in effect for many years and read as follows:

Rule 5-B. "In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car service rules and charges of the forwarding railroad (see note)."

Not: "Rule 5-B will apply only when the consignor or consignee is the actual owner of the property."

Rule 15-E. "Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly (see note)."

12 Note: "The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors at point of origin."

The said Official Classification and the said difference in rates as between carload and less than carload shipments apply to and prevail with all common carriers by railroad within the said Official Classification territory.

5. That the Export Shipping Company, defendant herein, is a forwarding agent. As such it seeks to carry on a business of the following nature, viz: The forwarding agent assembles, or causes to be assembled, at a given shipping point, several less than carload shipments of freight, owned by different persons, firms, or corporations, to an amount sufficient to make a carload. It orders a car from the railroad company, and loads or causes to be loaded into the car the said less than carload shipments. It takes out one bill of lading covering the goods, showing them to be shipped in the name of one consignor, who may be the forwarding agent or one of the several owners, to one consignee. It may receive the goods at the point of destination and distribute them to the several consignees entitled thereto, or the several consignees may themselves call for the goods at the railroad station. The forwarding agent seeks to pay the railroad company the carload rate that would apply to a carload of such goods as it may ship, if said goods were all owned by one consignor or one consignee. The owners of the various less than carload quantities of goods contained in said carload shipment would thus have their goods carried at rates considerably less than the less than carload rates applicable to their several shipments. The forwarder
13 agent would receive as its compensation for securing this reduced rate for the less than carload shipper and for such incidental services as it might perform a proportion of the difference between the carload and less than carload rate applicable to the shipment. The forwarding agent is not subject to the act to regulate commerce, as amended, hereinbefore mentioned. Its charges are, therefore, and would be solely a matter of private agreement, and would vary as its interests and the demands of competition might dictate.

In conformance with said rules 5-B and note and 15-E and note, your orators have at all the times herein mentioned, and for several years past, required and do now require that when carloads of freight are made up of less than carload shipments of goods owned by two or more separate persons, firms, or corporations, and intended to be delivered at the point of destination to two or more separate consignees, the freight rates for said shipments shall be the less than carload rates for the several less than carload shipments contained in said carloads of freight; and your orators, therefore, charge and collect from forwarding agents that combine the less than carload shipments of several owners into carloads and ship the same as carloads the less than carload rates applicable to the several less than carload shipments contained in said carloads.

6. That on or about April 23d, 1907, the Export Shipping Company, acting as a forwarding agent, caused to be delivered to the Wabash Railroad Company in Chicago, Illinois, 169 packages of merchandise, and consigned the said merchandise as a carload shipment, taking therefor a bill of lading showing the said merchandise to be shipped by the Export Shipping Company and consigned

to the Export Shipping Company, New York City, routed
14 via the Delaware, Lackawanna and Western Railroad
Company.

That on or about June 22d, 1907, the Export Shipping Company, as a forwarding agent, caused to be delivered to the New York, Chicago & St. Louis Railroad Company in Chicago 108 packages of merchandise, and consigned the said merchandise as a carload shipment, taking therefor a bill of lading showing the said merchandise to be shipped by E. Goldman & Company and consigned to order, E. Goldman & Company, New York City, notify F. G. Bailey, routed via the Delaware, Lackawanna and Western Railroad Company.

That on or about May 9th, 1907, the Export Shipping Company as a forwarding agent, caused to be delivered to the Baltimore & Ohio Railroad Company in Chicago 119 packages of merchandise, and consigned the said merchandise as a carload shipment, taking therefor a bill of lading showing the said merchandise to be shipped by the Export Shipping Company and consigned to the Export Shipping Company, New York City, routed via the Baltimore & Ohio Railroad Company.

Each of the shipments above described was in fact a carload of mixed merchandise, and consisted of several less than carload shipments of merchandise, severally owned and shipped by various persons, firms, and corporations in the city of Chicago, whose names are to your orators unknown, and consolidated into one carload shipment and tendered to the railroad company as a carload shipment through the agency of the Export Shipping Company. Upon the discovery by your orators of the nature and ownership of said shipments, your orators, in conformance with the said rules 5-B and note and 15-E and note, charged and collected from the consignees of said shipments the less than carload rates applicable
15 to the merchandise therein contained, as published and filed with the Interstate Commerce Commission.

7. That thereafter, to wit, on or about the 19th day of August, 1907, the Export Shipping Company filed three petitions with the Interstate Commerce Commission to recover alleged excess freight charges on the shipments hereinbefore described, the said alleged excess charges being the difference between the freight charges collected on the basis of the less than carload rates applicable to said shipments and the freight charges which would have resulted from the application of the carload rates to said shipments. One of said petitions was directed against the Wabash Railroad Company and the Delaware, Lackawanna and Western Railroad Company, as defendants, and set forth the shipment over the roads of those companies, as above described. The second of said petitions was directed against the New York, Chicago & St. Louis Railroad Company and the Delaware, Lackawanna and Western Railroad Company, as defendants, and set forth the shipment over the roads of those companies, as above described. The third petition was directed against

the Baltimore & Ohio Railroad Company, as defendant, and set forth the shipment over the road of that company, as above described. A copy of the said petition against the Wabash Railroad Company and the Delaware, Lackawanna and Western Railroad Company, being similar to the other two petitions, above mentioned, is hereto attached, marked "Exhibit A," and made a part thereof.

Thereafter your orators separately filed with the Interstate Commerce Commission their answers to the said petitions. A copy of the answer of the Wabash Railroad Company, being similar to the other answers, so filed, is hereto attached, marked "Exhibit B," and made a part hereof.

16. The three proceedings were consolidated and tried as one before the Interstate Commerce Commission, and hearings were had before said Commission on the 23d day of October and the 20th day of December, 1907, and evidence taken therein.

The issue that complainant before the Interstate Commerce Commission desired to raise, not having been properly and fully set forth in the pleadings, it was stipulated at the hearings that the question at issue was the legality of the note to Rule 5-B and of Rule 15-E and note, of the Official Classification, hereinbefore quoted, tested by the requirements of the said act to regulate commerce, as amended, said rules being challenged by complainant particularly as being in violation of section 2 of said act to regulate commerce, in that said complainant is prohibited by said rules from shipping carloads of freight at the same rate that is applied to carload shipments of freight of a single ownership.

8. That subsequent to the said hearings, to wit, on the 22d day of June, 1908, the said Interstate Commerce Commission made and filed and thereafter served upon your orators its report, order and opinions in said proceedings, copies of which are hereto attached, respectively marked Exhibits "C" and "D," and made a part hereof.

The said report and order of the Commission directs your orators on or before October 1st, 1908, to strike out and omit from their tariffs, and thereafter cease enforcing the said note to Rule 5-B and Rule 15-E and note contained in the said Official Classification, on the ground that the said rules are unjustly discriminatory, unjust, unfair and unreasonable, and violate the provisions of section 2 of the said act to regulate commerce, as amended, and said order

17. further directs your orators to pay to the Export Shipping Company, as reparation, sums equal to the difference between the freight charges, collected on the shipments hereinbefore described, and the charges that would have been collected had the carload rates been applied to said shipments.

Subsequently, to wit, on the 5th day of September, 1908, the Commission made and filed, and thereafter served upon your orator, an order extending the effective date of said order of June 22, 1908, to December 1, 1908.

9. Your orators further aver that for the reasons herein stated the enforcement of the said order of June 22, 1908, of the Interstate Com-

merce Commission should be permanently restrained by a decree of this court, and that pending the hearing and determination of this suit a temporary injunction should be issued herein suspending the said order, and enjoining any proceedings thereunder.

10. Your orators charge and aver that the main function of the forwarding agent is that of freight scalper, to secure lower rates for less than carload shippers of freight than the less than carload rates applicable to their shipments under the carriers' tariffs. The forwarding agent confers no other substantial benefit upon less than carload shippers. Less than carload shippers throughout the country have therefore no rights or interests to be protected and preserved by the continued existence of the forwarding agent, other than as they thereby secure the advantage of rates lower than the carriers' published rates on less than carload shipments.

The conditions and circumstances incident to and attending the transportation of a carload of freight of one owner, are substantially different than when a carload of freight is tendered 18 to your orators by a forwarding agent, that has combined in the said carload several less than carload shipments of different owners.

The forwarding agent's business is that of transportation. It makes its profits out of the transportation charge. It collects freight at the point of shipment and delivers it at the point of destination. To transport the freight between the two points, it uses the facilities of the railroad carrier. It performs the services of, and is, in the nature of its business and its relations to its customers and to the railroads, a common carrier or independent shipping agency. As such it is not a person within the meaning of the word as used in the said acts to regulate commerce, and is not entitled to transportation services from your orators on the same terms as persons within the purview of said acts.

The forwarding agent seeks to pay to your orators, for the use of their facilities in carrying out its contracts of transportation with the individual shippers, a less sum than your orators themselves charge said shippers, and it offers to said shippers lower rates than your orators do. It thus seeks by the methods of a freight scalper to take from your orators a part of their legitimate business, which would come to them in the absence of the forwarding agent. It is in fact a competitor of your orators in the matter of transportation, and as such is hostile to their interests and revenues.

Your orators have equipped themselves with facilities for consolidating the less than carload shipments of various shippers into carloads, and for receiving, loading and delivering such less than carload shipments. The forwarding agent seeks to perform for less than carload shippers the said services, incidental to transportation, 19 that your orators are prepared and desire to perform, thereby diverting from your orators the profits which accrue from the performance of such incidental services.

The said Official Classification permits the consolidation into a carload, by the owner, not only of two or more articles having the same carload rating, but also of articles having different carload ratings, and the application thereto of a carload rate. In the Official Classification there are 5,852 less than carload, and 4,235 carload ratings. Approximately 72 per cent. of the articles named in the Official Classification can therefore be combined into carloads and take a carload rating. In Official Classification territory fully half of the westbound, and a large proportion of the eastbound freight consists of less than carload shipments. The field for the operation of forwarding agents is therefore large. If your orators are required to accept the carload shipments of forwarding agents at the carload rating given to carload shipments of a single ownership, the business of the forwarding agent, requiring small capital and yielding easy and certain profits, will become general, and the less than carload business of your orators will be substantially reduced. A large part of the freight, now handled at the less than carload rate, will then be handled at a carload rate, and a large reduction in your orators' revenue will result.

Your orators have been required, as common carriers, to provide at great expense, equipment and facilities for the handling and transportation of less than carload freight, expensive terminals in large cities, freight houses and yards, transfer platforms, loading and unloading equipment, clerical forces and equipment, station agencies and the like. If forwarding agents be allowed to

20 operate extensively, your orators will still continue to have a considerable amount of less than carload business to handle, for which their less than carload plants will have to be maintained in substantially their present condition. The freight houses cannot be diminished, nor the fixed charges lowered, nor the number of trains for less than carload shipments reduced. The clerical and laboring forces cannot be reduced in proportion to the falling off in less than carload traffic which would result. Practically the same less than carload expenses will have to be charged against the decreased less than carload revenues. The net revenues of your orators will thus be materially reduced. To maintain their present net revenues, your orators will be compelled to increase their less than carload or carload rates or both, or allow the service to deteriorate. The general operation of forwarding agents would thus affect the business interests of your orators to their serious detriment by depriving them of an important source of revenue, and by reducing the value of their less than carload plants, in so far as such plants would become useless by reason of the falling off in less than carload business.

The operation of forwarding agents would result in widespread discrimination among less than carload shippers in the matter of both rates and service. This result inheres in the business of the forwarding agent, and would become more serious as the business of

the forwarding agent became more general. The forwarding agent, as compensation for its services in securing for a less than carload shipper a lower rate than the less than carload rate, would divide with the shipper the difference between the less than carload and the carload rate. It might charge one less than carload shipper a given price for its services, another a different price. One shipper it might serve for a nominal sum. Another it might refuse to serve absolutely. The range of its charges would be limited only by the difference between the less than carload and the carload rates on a given commodity. Discrimination therefore would necessarily follow the operation of the forwarding agent: discrimination between the shippers who must use the less than carload rate and those fortunate enough to ship through the forwarding agent; among the many shippers, who would ship through the forwarding agent, in that the freight rates such shippers would actually pay would vary with the charge of the forwarding agent; and discrimination in the services which the forwarding agent might afford to large and favored shippers and deny to small and less important shippers.

The forwarding agent could operate successfully only in places from which the number of less than carload shipments was large enough to make its business profitable. Less than carload shippers in small towns would be unable to secure its services and would thus be put at a disadvantage as against their competitors in large places.

The freight rate which less than carload shippers, shipping through the forwarding agent, actually would pay, would be secret, unstable and variable.

The operation of the forwarding agent would mean the intervention of another middleman between the producer and consumer, a new factor that must make its profit out of the transportation service. The ultimate result would be an increase in the cost of articles to the consumer, without increasing their value. All these results of the operation of the forwarding agent would affect the business and revenues of your orators.

Such results your orators seek to prevent by the enforcement of said rules 5-B and note and 15-E and note.

22 In portions of the United States outside of Official Classification territory the rules of the carriers forbid the general mixing of commodities, to be shipped at one time in one car at one carload rate, but permit the consolidation of such commodities as may be mixed, by forwarding agents who may then ship for the several owners at carload rates. The result of such practice has been in such outside territory and would be in Official Classification territory, if the forwarding agents were permitted to transact business therein, greater delay habitually in the loading of cars of forwarding agents than of cars shipped by one owner. As a general rule no demurrage accrues at the point of loading on carload shipments of one ownership. For this delay to their equipment, your orators would not be fully compensated by demurrage charges. The tendency to

delay in loading is inherent in the business of the forwarding agent and has manifested itself in various shipments of The Export Shipping Company, hereinbefore mentioned. It results from a division of responsibility in the matter of loading among the several actual owners of the freight, the carting of the freight by the different draymen of the several owners, the withdrawal of shipments at the last moment by the owners thereof, and the interest the forwarding agent has in holding the car until it is filled to its capacity.

In the case of carload shipments by forwarding agents, as compared with carload shipments of a single ownership, false billing and false classification are and would be more prevalent, due to the greater opportunity and temptation therefor which would result. Carload shipments of a forwarding agent would often be made up of many different classes of freight. Carload shipments of a single ownership usually consist of a single class of freight. High

23 class freight is easily concealed in consolidated carloads,

which freight your orators would not knowingly accept without special limitation of their liability. Since the profit of the forwarding agent and the saving to the actual shippers depend upon the lowness of the carload rating secured, and since when freight of different classes is mixed, the carload rating and minimum weight for the highest class applies to the whole carload, the temptation to false classification is and would be materially increased by permitting the forwarding agent to conduct its business as desired.

Carloads of forwarding agents would contain shipments of heavy articles together with those of light and breakable ones, to a greater extent than carload shipments of a single ownership, and would thus be more susceptible to damage. In case of loss, damage, or delay to such shipments, your orators could not adjust the claims and obtain valid releases from the forwarding agent, but would be subject to actions in tort by the several actual owners of the goods, as well as to an action on contract by the forwarding agent, which actions might be brought in widely separated localities. A judgment for your orators against one owner would be no bar to suits by other owners, and in each case the costs and expenses of litigation would be considerable.

Your orators would be subject to greater liabilities in the case of carload shipments of a forwarding agent than of a single owner, by reason of the operation of the following rules of law: The freight of anyone of the several owners might be seized by legal process. The real owner might at any time reclaim his goods from the possession of the carrier, irrespective of who is the consignor. The real owners might severally exercise the right of stoppage in transit. In all such events the responsibilities of your orators would be increased
24 and complicated, both to the owners of goods directly affected, and to owners of other goods in the same car, thereby delayed in transportation.

11. Your orators further aver that section 2 of the said act to regulate commerce, as amended, reads as follows:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

That the circumstances and conditions under which carload shipments of forwarding agents, made up of the several less than carload shipments of various owners, are transported by your orators, are substantially dissimilar from the circumstances and conditions under which carload shipments of a single ownership are transported by your orators. The dissimilar circumstances and conditions appear from the facts hereinbefore set forth, and may be summarized as follows:

(A) The forwarding agent is not a "person" within the definition of said section 2. On the contrary, it is an independent shipping agency or common carrier, and as such seeks to use the facilities and equipment of your orators.

(B) The forwarding agent is a competitor of your orators. By the methods of a freight scalper it seeks to perform services and to divert from your orators' business which your orators are equipped for and desire to handle, and would in the absence of the forwarding agent receive. For such purposes it seeks to use the facilities and equipment of your orators.

(C) The operation of forwarding agents would materially injure the business of your orators, by reducing their net revenue and impairing the value of their less than carload equipment.

(D) The operation of forwarding agents would result in widespread discrimination among less than carload shippers throughout the country, thereby injuring the business interests of a large number of your orators' less than carload shippers and patrons, which injuries must ultimately have a detrimental effect upon the business of your orators.

(E) The extensive operation of forwarding agents, by reducing your orators' revenues, would compel them to raise their freight rates or diminish their service, necessitating a readjustment of long established relations between the carriers and shippers and among shippers themselves, to the injury of your orators' less than carload shippers and patrons and your orators' business.

(F) The extensive operation of forwarding agents would result in economic changes, such as the elimination of small jobbers, that

will injure the business interests of many of your orators' less than carload shippers and patrons, and thereby your orators' business.

26 (G) False-billing and false classification are more prevalent in carload shipments by forwarding agents than in carload shipments of a single ownership, and your orators would be subjected to greater expense and vigilance in detecting and preventing such practices.

(H) The carload shipments of forwarding agents would subject your orators to increased claims for damages and to a multiplicity of suits by the several owners of the goods contained in said shipments.

(I) The carload shipments of forwarding agents would result in greater delay to cars at point of loading than carload shipments of a single ownership.

(J) The carload shipments of forwarding agents would subject your orators to greater liability than carload shipments of a single ownership, by reason of the operation of several rules of law, namely, seizure of goods by legal process, reclamation of goods by their real owner, and stoppage in transit.

That your orators have the right to charge a higher freight rate for transporting a carload of freight consisting of the less than carload shipments of several owners, consolidated and delivered to your orators by a forwarding agent, than your orators charge for transporting a carload of freight of a single ownership.

That the actual shippers, the owners of the less than carload shipments contained in the consolidated carload, are not in any way discriminated against, since they are charged by your orators for the transportation of such less than carload shipments, the same freight rate that every other less than carload shipper pays.

That the application of the less than carload rate to carload 27 shipments of forwarding agents, and of the carload rate to carload shipments of a single ownership, is not a discrimination within the meaning of section 2 of the said act to regulate commerce, as amended.

That the application of a higher rate to the carload shipments of forwarding agents, than to the carload shipments of a single ownership, is lawful, reasonable, just, and not unjustly discriminatory nor unduly preferential or prejudicial, nor otherwise in violation of the said act to regulate commerce, as amended.

That the said defendant, the Interstate Commerce Commission, is constituted, organized, and exists under various acts to regulate commerce, and has no power or authority other than that given to and conferred upon it by said acts.

That the said order of June 22d, 1908, made by the said Interstate Commerce Commission, as aforesaid, is illegal and void, and the said Interstate Commerce Commission had no power, jurisdiction or authority of law to make the same.

12. Your orators aver that the forwarding agent is an independent shipping agency, and in the nature of its business a common carrier. That as such it is not a person within the definition of the word as used in the said acts to regulate commerce. That it can not legally require your orators to perform transportation services for it, when shipping as such forwarding agent. That the Interstate Commerce Commission had, therefore, no power, jurisdiction, or authority of law to compel your orators to perform such services, and the said order of June 22d, 1908, is illegal and void.

13. Your orators aver that forwarding agents are competitors of your orators in the matter of transportation, and their general operation would materially reduce your orators' revenues. That

28 your orators, in order to protect their business and secure a reasonable profit therefrom, have the right to fix the terms upon which they will accept for transportation consolidated carloads from such competitors. That the said order of June 22d, 1908, deprives your orators of such right, to the consequent reduction of their net revenue and depreciation of their property, and is, therefore, illegal and void in that it takes your orators' property without due process of law, contrary to the Constitution of the United States.

14. Your orators aver that the said interstate commerce act, as amended, was intended primarily to preserve equality among shippers. That said act was also intended to secure the publicity and stability of all charges for the service of transportation and all services incidental thereto or connected therewith. That the business of the forwarding agent results in widespread discrimination among less than carload shippers, as hereinbefore described, renders all transportation charges flexible instead of stable, and dependent upon the will and caprice of the forwarding agent, and makes it impossible for any less than carload shipper to know the rates at which his less than carload competitors are shipping. That in so far as the business of the forwarding agent produces such results, it nullifies the provisions of the second, third, and sixth sections of the said act to regulate commerce, as amended. That if the said order of the Interstate Commerce Commission be enforced against your orators, the purpose of the said act to regulate commerce, as amended, will be subverted, and the evils that said act was designed to prevent will be restored. That the said order requires your orators to permit, sanction, and engage in a practice which violates the said sec-

ond, third, and sixth sections of the said act to regulate
29 commerce, as amended, and is therefore illegal and void.

15. And your orators further aver that section 10 of the said act to regulate commerce, as amended, reads as follows:

"Any common carrier subject to the provisions of this act * * * who by any other device or means shall knowingly and wilfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor."

"Any person * * * who shall deliver property for transportation to any common carrier * * * who shall knowingly and wilfully * * * by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor."

That section 6 of the said act provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at 30 the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

That section I of the "Act to further regulate commerce with foreign nations and among the States," approved, February 19th, 1903, as amended June 29th, 1906, known as the Elkins Act, provides:

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person."

Also:

"Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee, any such carrier shall transport property" (in interstate commerce) "who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed 31 by the schedules of rates provided for in this act, shall in addition to any penalty provided by this act forfeit to the United States, &c."

That when a forwarding agent collects and consolidates into a carload, the less than carload shipments of several owners and tenders such carload of freight to your orators as a carload shipment, the real shippers of the freight contained in said carload are the several owners thereof. That each of said owners is in fact a less than carload shipper. That the only legal rate applicable to a less than carload shipper is the less than carload rate published and filed

by your orators with the said Interstate Commerce Commission. That a less than carload shipper, by shipping his goods in combination with the less than carload shipments of various other shippers through the instrumentality of a forwarding agent, seeks to secure the transportation of his goods at a lower rate than the legal rate applicable thereto.

That the forwarding agent is a device or instrumentality, whereby less than carload shippers seek to accomplish such purpose in violation of the said sections 6 and 10 of the act to regulate commerce, and section I of the Elkins Act, above quoted. That the said order of the Interstate Commerce Commission attempts to legalize a practice that violates the said provisions of the acts to regulate commerce, and requires your orators to participate in and be parties to said illegal practice, and is, therefore, illegal and void, and the said Interstate Commerce Commission had no power, jurisdiction, or authority of law to make the same.

Wherefore, your orators pray:

That, pending the final determination of the case, an order
32 be made herein suspending the said order of June 22d, 1908,
of the said Interstate Commerce Commission, and enjoining
any proceeding thereunder, either by the said Commission or by the
said defendants, The Export Shipping Company, or Edward B.
Boise, as trustee in bankruptcy of The Export Shipping Company.

That upon the final hearing of the case, a decree be made setting aside and annulling the said order of the Interstate Commerce Commission, and perpetually enjoining any action or proceedings thereunder, and that your orators may have such other and further relief in the premises as the nature and circumstances of the case may require.

To the end, therefore, that the defendants may, if they can, show why your orators should not have the relief hereby prayed, and may full, true, direct, and perfect answer make, according to the best of the knowledge, remembrance, information, and belief of the proper members of the said defendant, The Interstate Commerce Commission, of the proper officers of the defendant, The Export Shipping Company, and of the said defendant, Edward B. Boise, but not under oath (answer under oath being hereby expressly waived), to the several matters herein charged, as fully and particularly as if the same were here repeated, and the defendants especially interrogated as to each and every of such matters.

May it please your honors to grant unto your orators a writ of subpoena ad respondendum, issuing out of and under the seal of this honorable court, directed to the said defendants, The Interstate Commerce Commission, The Export Shipping Company, and Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company, commanding them and each of them, by a certain day, and under a certain penalty, to be and appear in this honorable court, then and there to answer to the premises, and to stand to and abide by

33 such order and decree as may be made against them or any of them. And your orators will ever pray.

THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY,

THE WABASH RAILROAD COMPANY,
THE NEW YORK, CHICAGO & ST. LOUIS
RAILROAD COMPANY,

THE BALTIMORE & OHIO RAILROAD COMPANY,
By WILLIAM S. JENNEY.

WILLIAM S. JENNEY,
DOUGLAS SWIFT,

Solicitors for Complainants.

(Office & post-office address, 90 West street, Borough of Manhattan,
city of New York.)

HUGH L. BOND,

JOHN H. CLARKE,

CLYDE BROWN,

GEORGE S. PATTERSON,

Of Counsel for Complainants.

SOUTHERN DISTRICT OF NEW YORK,

County of New York, ss:

WILLIAM S. JENNEY, being duly sworn, deposes and says: That he is the vice-president and general counsel of The Delaware, Lackawanna and Western Railroad Company, one of the complainants herein, and the duly authorized agent of each of the complainants herein to verify the foregoing bill of complaint; that he has 34 read the said bill of complaint and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WILLIAM S. JENNEY.

Subscribed and sworn to before me this 15th day of October, 1908.

[SEAL.]

JOSEPH FIELD,

Notary Public, New York County.

35

EXHIBIT A.

Interstate Commerce Commission.

THE EXPORT SHIPPING COMPANY |

against

THE WABASH RAILROAD COMPANY |
and The Delaware, Lackawanna & Western Railroad
Company.

The petition of the above-named complainant respectfully shows:

I. That the Export Shipping Company is a corporation engaged in business of forwarding agents and custom house brokers, maintain-

ing offices at No. 11 Broadway, New York City, and No. 185 Dearborn street, Chicago.

II. That the defendants above-named are common carriers engaged in the transportation of passengers and property by railroad between points in the State of Illinois and points in the State of New York, and, as such common carriers, are subject to the provisions of the act to regulate commerce approved February 4, 1887, and acts amendatory thereof or supplementary thereto.

III. That on or about April 23, 1907, the complainant caused to be delivered to the Wabash Railroad Company at its station in Chicago 169 packages of merchandise loaded into Lake Shore & Michigan Southern car #41702, and caused to be issued a bill of lading showing goods to be shipped by the Export Shipping Company, and consigned to the Export Shipping Company, #9 Broadway, New York, routed via Delaware, Lackawanna & Western Railroad, which 169 packages consisted of the following:

163 bags rubber scrap weighing-----	18,320 lbs.
4 packages machinery weighing-----	2,590 "
1 package lawn swings K. D. weighing-----	648 "
1 box common moulding weighing-----	255 "
A total of-----	21,813 "

IV. That on arrival of the goods in New York the Delaware, Lackawanna & Western Railroad Company demanded freight on said goods as follows:

163 bags weighing 18,320 lbs., @ 40 cts. per 100 lbs.; 4 packages weighing 2,590 lbs., @ 65 cts. per 100 lbs.; 1 package weighing 648 lbs., @ 65 cts. per 100 lbs.; 1 package weighing 255 lbs., @ 30 cts. per 100 lbs.; a total amount of \$95.08, which amount was paid under protest.

V. That 30c. per 100 pounds is the correct rate, Chicago to New York, on earloads of straight or mixed cars of not less than 24,000 pounds of goods shipped, and the correct amount of freight should have been \$72.00.

VI. That complainant is being discriminated against in that he is not permitted to ship a carload of merchandise at tariff rates and at rates and under conditions which are granted to other shippers.

Wherefore the petitioner prays that the defendants may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendants to cease and desist from said violations of the act to regulate commerce, and that defendants be required to refund the excess charges collected, amounting to \$23.08, with interest from April 30th, 1907, and for such other and further order as the Commission may deem necessary in the premises.

Dated at New York, the 19th day of August, 1907.

THE EXPORT SHIPPING COMPANY,
F. G. BAILEY, President.

EXHIBIT B.

Separate answer of the defendant, The Wabash Railroad Company.

Before the Interstate Commerce Commission.

THE EXPORT SHIPPING COMPANY

v.s.

THE WABASH RAILROAD COMPANY, et al.

Docket No. 1228.

Comes now the defendant, The Wabash Railroad Company, and for answer to complainant's petition, respectfully shows:

First. Paragraph I of said petition is admitted.

Second. Paragraph II of said petition is admitted.

Third. Defendant admits that on or about the 23d day of April, 1907, complainant caused to be delivered to this defendant, at its station in Chicago, a mixed shipment of merchandise, consisting of 169 packages, which said packages consisted of the articles set forth in Paragraph III of the petition herein.

Defendant admits that it issued a bill of lading to the complainant, indicating that said goods were to be shipped by The Export Shipping Company, and consigned to The Export Shipping Company, No. 9, Broadway, New York, and that said shipment was routed via The Delaware, Lackawanna and Western Railroad.

Defendant denies that the complainant herein was the owner or shipper of the goods, or any part thereof, aforesaid, but alleges the fact to be that the said mixed shipment was in fact shipped and owned by various persons and corporations in the city of Chicago, the names of such persons and corporations being at the present time unknown to this defendant, and defendant further says that the complainant herein represented to this defendant that it was the owner and shipper of the goods aforesaid for the purpose of securing for said shipment the carload rate from Chicago to New York. Defendant further says that thereafter, upon making discovery of the facts as above set forth, it notified the defendant, The Delaware, Lackawanna and Western Railroad, that the said shipment was in truth and in fact made up of various and divers L. C. L. shipments, by various and divers persons, firms, and corporations in the city of Chicago, and that the same was not entitled to the carload rate on such shipments, but should be charged at less than carload rates; that thereupon the Delaware, Lackawanna and Western Railroad Company collected from the consignee, the Export Shipping Company, the regular schedule of charges on said shipments, at the less than carload rates, which said rates are as set forth in Paragraph III of complainant's petition.

Defendant further says that Rule 5-B of the classification in force at the time mentioned in the petition, provides that in order to entitle a shipper to carload rate, the quantity of freight requisite under the rules to secure such rate, must be delivered on one working day, by

one consignor, consigned to one consignee and destination; said classification further provides as follows:

"Rule 5-B will apply only when the consignee or consignor is the actual owner of the property."

Defendant says and alleges the fact to be, that it was the purpose and intent of the complainant to evade the provision of the classification above mentioned, by representing itself to be the consignor of the goods in question, for the purpose of securing the carload rate thereon.

Fourth. Defendant denies that complainant is being discriminated against, in that he is not permitted to ship a carload of merchandise at tariff rates, and at rates and under conditions which are granted to other shippers. But this defendant alleges on information and belief, that a part of complainant's business in the city of Chicago, Illinois and other cities, is what is known as a "Consolidator"—that is to say, it makes a practice of collecting less than carload shipments from divers persons, firms and corporations, and by consolidating such less than carload shipments, and by then representing to the railroad companies that it is the owner and consignor of such goods shipped, thereby attempting to secure a carload rate thereon, and defendant alleges on information and belief, that in accordance with the practice of complainant herein set forth, it made the shipment complained of in the petition herein.

40 Defendant further alleges on information and belief, that complainant, as compensation to it for the work of consolidating less than carload shipments, and for securing the carload rates thereon in the manner above described, divides the difference between the carload rates on such shipments and the L. C. L. rates on such shipments with the true owners and consignors of the goods shipped.

Defendant says that by reason of the practice of the complainant herein, it has no standing before this Commission to prosecute this case, as set forth in the petition herein.

Wherefore, having fully answered, this defendant prays to be hence dismissed with its costs.

WABASH RAILROAD COMPANY,
By N. S. BROWN, *Its Attorney.*

Order.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22d day of June, A. D. 1908,

Present: Martin A. Knapp, Judson C. Clements, Charles A. Prouty, Francis M. Cockrell, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Commissioners.

No. 1228. Export Shipping Company v. Wabash Railroad Company and Delaware, Lackawanna & Western Railroad Company.

No. 1229. Same v. New York, Chicago & St. Louis Railroad Company and Delaware, Lackawanna & Western Railroad Company.

No. 1230. Same v. Baltimore & Ohio Railroad Company.

42 These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

It is ordered, That the above-named defendant carriers be, and they are hereby, notified and required to strike out and omit, on or before the 1st day of October, 1908, and cease and desist from enforcing, as regards transportation subject to the act to regulate commerce, note to Rule 5-B and Rule 15-E, appearing in Official Classification, which are as follows, to wit:

"NOTE.—Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.

"RULE 15-E: Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly (see note)."

And said defendants are hereby further notified and required to cease and desist, on or before said date, from refusing to apply their carload rates to the transportation subject to the act to regulate commerce of carload lots consisting of packages of various ownership tendered as a single shipment by one consignor to one consignee.

And said defendants are hereby further notified and required to cease and desist, on or before said date, from making ownership or lack of ownership of property presented to them for transportation subject to the act to regulate commerce the test for the applicability to said transportation of said property of any of their rates whatsoever.

43 And said defendants are hereby authorized to make said changes in their classification and rules effective upon three days' notice to the public and the Commission, given in the manner required by law. The tariffs in which such changed rules are given must contain the notation that they are issued under the authority hereby granted, and must refer to the titles and number of these cases.

It is further ordered, That the defendants above named in case No. 1228, to wit, Wabash Railroad Company and Delaware, Lackawanna & Western Railroad Company, be, and they are hereby, authorized and directed, on or before the 1st day of October, 1908, to pay unto the complainant, The Export Shipping Company, the sum of \$23.08, as reparation for exactation of an unreasonable charge for the transportation of 169 packages of merchandise from Chicago, Ill., to New York, N. Y., as more fully and at large appears in and by said report

of the Commission, which said report is hereby referred to and made a part of this order.

It is further ordered, That the defendants above named in case No. 1229, to wit, New York, Chicago & St. Louis Railroad Company and Delaware, Lackawanna & Western Railroad Company, be, and they are hereby, authorized and directed, on or before the 1st day of October, 1908, to pay unto the complainant, the Export Shipping Company, the sum of \$65.60, as reparation for exaction of an unreasonable charge for the transportation of 10 packages of merchandise from Chicago, Ill., to New York, N. Y., as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

And it is further ordered, That the defendant above named in case No. 1230, to wit, The Baltimore & Ohio Railroad Company, be, and it is hereby, authorized and directed, on or before the 1st day of

October, 1908, to pay unto the complainant, The Export Shipping Company, the sum of \$44.74, as reparation for exaction of an unreasonable charge for the transportation of 119 packages of merchandise from Chicago, Ill., to New York, N. Y., as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

EXHIBIT D.

No. 1228. Export Shipping Co. vs. Wabash R. R. Co. et al.

No. 1229. Same vs. New York, Chicago & St. Louis R. R. Co. et al.

No. 1230. Same vs. Baltimore & Ohio R. R. Co.

Submitted Feb. 3, 1908. Decided June 22, 1908.

Complainant delivered to defendants in Chicago for transportation to New York 3 carloads of freight, consisting of a number of packages of various ownership, assembled by complainant before delivery to the carrier, and each consigned under a single bill of lading to a single consignee. On arrival in New York the delivering carrier refused to apply the carload rate, but in accordance with the note to Rule 5-B and Rule 15-E of the Official Classification, assessed the less than carload rates. Held, That note to Rule 5-B and 45 Rule 15-E are unlawful. California Commercial Association vs. Wells, Fargo & Co., supra followed. Reparation awarded.

Francis G. Bailey and Walter J. McCoy for complainant.

Carnahan, Slusser & Cox for American Forwarding Co. and Transcontinental Freight Co., interveners.

John G. Wilson for B. & O. R. R.

G. S. Patterson for P. R. R.

Douglas Swift and W. S. Jenney for Wabash R. R. and D., L. & W. Ry.

J. C. Clarke for N. Y., C. & St. L. R. R.

Seth Mann for Pacific Coast Jobbers' & Manufacturers' Association.
S. F. Andrews for Southern Ry.

H. H. Smith for Manufacturers' Association of Michigan and other associations.

M. F. Bowen for Manufacturers' Club of Buffalo.

F. C. Dilard for Atlantic Steamship Co.

T. B. Harrison for Adams Express Co. and American Express Co.

Report of the Commission.

Lane, Commissioner:

The complainant is a corporation, engaged in the business of forwarding agent and of custom-house broker at Chicago and New York City. Defendants are common carriers engaged in the transportation of passengers and property by railroad between points in the State of Illinois and points in the State of New York, and are subject to the provisions of the act to regulate commerce as amended. The Official Classification, to which the several defendants in these cases are parties, contains certain rules which define and limit the 46 circumstances and conditions under which shipments shall be entitled to carload rates. These rules have been continuously in force since a time prior to the shipments which form the bases for these complaints, and are as follows:

"Rule 5-B: In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car-service rules and charges of the forwarding railroad (see note).

"Railroad agents at forwarding points will not sign shipping receipts bearing the notation 'part carload lot' until shipping receipts for the whole carload have been presented and the freight received, in order that bill of lading may be obtained at the carload rate. Only one original bill of lading for the whole carload shall be issued (see note).

"Railroad agents at forwarding points will not receive property in carloads for distribution by railroad agents to two or more parties; delivering agents will deliver property only to consignee thereof or to the party presenting consignee's written order, and will not recognize orders from consignor or consignee providing for distribution of carload shipments among various consignees or calling for split deliveries according to brands, marks, sizes, or other identification of packages, nor will railroad agents at delivering points in any way act as the representative of the consignor or consignee for the distribution of carload shipments (see note).

"**NOTE.**—Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.

"Rule 15-E: Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well

as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly (see note).

"NOTE.—The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors at point of origin."

The complaint in No. 1228 is based upon a shipment delivered by the complainant to the Wabash Railroad Company at its station in Chicago on or about April 23, 1907, for transportation to New York, routed via the Delaware, Lackawanna & Western Railroad. The shipment consisted of 169 packages of merchandise of various ownership, aggregating 21,813 pounds in weight, assembled by the complainant before delivery to the carrier. The bill of lading showed the Export Shipping Company as consignor and the Export Shipping Company, 9 Broadway, New York, as consignee. On arrival of the goods in New York the Delaware, Lackawanna & Western Railroad Company refused to apply its carload rate, but, in accordance with the note to Rule 5-B and Rule 15-E, assessed its less than carload rates. This resulted in the collection of a total charge of \$95.08, or \$23.08 in excess of the charges which would have been paid if the carload rate had been applied.

The complainant in No. 1229 is based upon a shipment delivered by the complainant to the New York, Chicago & St. Louis Railroad Company at its station in Chicago, on or about June 22, 1907, for transportation to New York, routed via the Delaware, Lackawanna & Western Railroad. The shipment consisted of 108 packages of merchandise of various ownership, aggregating 25,605 pounds in weight, assembled by the complainant before delivery to the carrier. The bill of lading showed E. Goldman & Co. as consignor and E. Goldman & Co. as consignee "notify F. G. Bailey, Broadway, New York." On arrival of the goods in New York the Delaware, Lackawanna & Western Railroad Company refused to apply its carload rate, but, in accordance with the note to Rule 5-B and Rule 15-E, assessed its less than carload rates. This resulted in the collection of a total charge of \$155.60, or \$65.60 in excess of the charges which would have been paid if the carload rate had been applied.

48 The complaint in No. 1230 is based upon a shipment delivered by the complainant to the Baltimore & Ohio Railroad Company at its station in Chicago on or about May 9, 1907, for transportation to New York, routed via the Baltimore & Ohio Railroad. The shipment consisted of 119 packages of merchandise of various ownership, aggregating 35,285 pounds in weight, assembled by the complainant before delivery to the carrier. The bill of lading showed the Export Shipping Company as consignor and the Export Shipping Company, at 9 and 11 Broadway, New York, as consignee. On arrival of the goods in New York, defendant refused to apply its carload rate to the shipment as an entirety, but assessed its carload rate against a part of the consignment and less than carload

rates against the remainder. This resulted in the collection of a total charge of \$149.60, or \$44.74 in excess of the charges which would have been paid if the shipment had been treated as an entirety.

Complainant and interveners ask that the note to Rule 5-B and Rule 15-E be declared unlawful, because in violation of section 2 of the act to regulate commerce, and that reparation be awarded complainant in the amount of the excess charges collected through the enforcement of the note and rule aforesaid.

These cases are governed in all respects by the decision just rendered in the case of California Commercial Association vs. Wells, Fargo & Co., *supra*.

Our conclusions are as follows:

The note to Rule 5-B and Rule 15-E of the Official Classification, as quoted above, are unjustly discriminatory, unjust, unfair, and unreasonable in this: That they provide that defendants shall collect a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce than defendants collect from other persons for doing for them a like and 49 contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates. Complainant is entitled to reparation to an amount equal to the difference between the amount collected by defendants and the amount which would have been collected if each shipment had been treated as an entirety and the carload rate assessed in each case. An order will be entered in accordance with these conclusions.

KNAPP, chairman, dissenting:

I can not agree with the views of the majority in these cases and am constrained to state, perhaps at undue length, the grounds of my dissent.

Complainant and interveners contend that the rules here challenged are in violation of section 2 of the act, and this contention presents the sole issue to be determined. The importance of this question, whether regarded from the standpoint of the railway, the shipper, the jobber, or the consumer, is obvious and far-reaching. The majority opinion merely refers to the conclusions announced in California Commercial Association vs. Wells, Fargo & Co., *supra*, a case involving the so-called "quantity" rates of express companies. These cases cover the wider field of freight rates, and inasmuch as the order to be made involves in effect the abolition of a long-established practice and establishes a new rule of action for practically all carriers by railroad, as well as the defendants in these proceedings, I deem it proper, before proceeding to discuss the legal phases of the controversy, to state somewhat fully the facts and suggestions disclosed by the record.

50 The complainant and interveners are forwarding agents.

At present there are a considerable number of individuals and corporations, located at large cities, engaged in the same business as complainant. The business of the forwarding agent, in so far as is material to the question involved, is to collect less than carload shipments from different consignors, combine such shipments into carloads, and ship the same in the name of the forwarding agent, or of the owner of one of the less than carload shipments, to one consignee, who may be the forwarding agent himself, another forwarding agent at the point of destination with whom he has business relations, or the owner of a part of the property transported. The consignee of the shipment, whoever he may be, receives the carload and distributes its contents to the parties for whom they are intended. The forwarding agent finds his compensation and profit in the difference between the carload and less than carload rates.

The saving effected by securing application of the carload, rather than the less than carload rates, may be divided between the forwarding agent and his customer in any agreed proportion. To the extent that the customer secures the carriage of his property at a lower rate than the less than carload rate, which would otherwise be applied, he saves money, and the division of the difference between the carload and the less than carload rates is a matter of private bargain between him and the agent. It is true that certain forwarding agents testified at the hearing that their charge for combining and forwarding shipments from Chicago to the Pacific coast is 15 cents per 100 pounds, and that they uniformly maintain this charge. But it is apparent that they are under no legal obligation to make the same division with each customer, and that the commercial limitation upon their charge would be determined by their own advantage.

51 Within this limit they can make any arrangement they may agree upon, with the result that each of two or more shippers, forwarding the same article between the same points in the same car, may pay a different amount for the transportation; that is to say, each will pay no more than the carload rate on the amount shipped plus the forwarding agent's charge, and the latter may vary as to each shipper.

The evidence discloses that the forwarding agency may be used in any manner that will operate to effect a saving in freight rates. The individual shippers are not necessarily located at the same point, nor are the individual consignees. For instance, if a reduction in rates could be effected a furniture dealer at Grand Rapids, Mich., having a shipment for a point in Maine, and a furniture dealer in Rockford, Ill., having a shipment for a point in Massachusetts, might forward their separate shipments at less than carload rates to Chicago; there the two shipments would be consolidated and forwarded at carload rates to Boston; and thence shipped again at less than carload rates from Boston to their respective destinations.

The use of a forwarding agent may permit the less than carload shipper to reach markets from which he would be excluded by less

than carload rates, provided he is so located that he can combine his shipments with others of like nature and can make contracts with the forwarding agent. On the other hand, the forwarding agent is free to contract as he desires, and it may happen, if a given shipper cannot be accommodated or does not agree as to terms, that he would be obliged to pay the less than carload rate upon a shipment sold or to be sold in competition with a similar less than carload shipment carried at a lower rate. Apparently it is within the power of the forwarding agent at least where the less than carload rate is prohibitive to determine, out of a class of shippers, who shall and who shall not be able to sell at a given destination.

Upon hearing it was urged by interveners that there are many reasons aside from the saving in freight rates which justify the existence of the forwarding agent. It is claimed that goods are less likely to be damaged when loaded in one car going directly from point of origin to destination, and that generally less time is consumed in the transportation of a carload billed through than in the transportation of a less than carload shipment which may be transferred from one car to another several times en route. Whatever the fact may be in this regard, the rules here in question do not prohibit a forwarding agent from giving his patrons whatever benefit may accrue from through shipment in one car, but merely provide that in case of such consolidation the less than carload rates shall be applied to the several shipments composing the carload.

Complainant and interveners suggested that enforcement of the rules here challenged is a matter of recent occurrence, but this was denied by defendants, and there is no proof to the contrary. Many tariff rules and regulations have been more rigidly observed since the amendment of the act of 1906, and the failure to apply these rules strictly and impartially in the past may have been one of the instances of laxity in transportation practices which formerly occurred. However, the cases of Lundquist vs. G. T. W. Ry. Co. et al., 121 Fed. Rep., 915, decided in 1901, and Buckeye Buggy Company vs. C. C. C. & St. L. Ry. Co. et al., 9 I. C. C. Rep., 620, decided in 1903, indicate that in those years the railroads were attempting to enforce similar rules. Defendants say the note to Rule 5-B was established in compliance with the Commission's order in the Buckeye Buggy Company case. However this may be, still the extent of the decision in

53 that case was merely to require the allowance of carload ratings in cases where, upon delivery to the carrier, either the consignor or the consignee is the owner of the entire contents of the car. Whether the carrier may distinguish between the forwarding agent and the actual owner was not involved or decided.

The privilege sought by the forwarding agent of combining shipments of different ownership is entirely distinct from the privilege allowed to individual owners of combining and forwarding at carload rates shipments of different commodities. Generally speaking, where the latter privilege is allowed the former is denied, and vice versa. In Western Classification territory there is a distinct prohibition

against the combination of two or more articles of single ownership having the same or different carload ratings, for the purpose of obtaining the carload rate, except as such combinations may be specifically authorized in the classification. In like manner there is no general warrant for such mixed carloads in the South, and the specific provisions in the Southern Classification for combined carloads are even more limited in number and extent of mixture than those authorized in the Western Classification. On the other hand, a rule of the Official Classification authorizes the combination by the owner and carriage at carload rates of any two or more articles having the same carload rating, as well as the mixing of articles having different carload ratings, proper details being provided as to rates and minimum weights at which such combined shipments will be carried.

In this connection it is also to be observed that there is a radical difference in respect to the number of carload and less than carload ratings between the Western and Southern classifications on the one hand and the Official Classification on the other. A recent

54 careful and authoritative examination of the several classifications shows that in the Southern Classification there are 3,503 less than carload and only 773 carload ratings, the carload ratings being 22.1 per cent of the less than carload; in the Western Classification there are 5,729 less than carload and only 1,690 carload ratings, the carload ratings being 29.8 per cent of the less than carload; while in the official Classification there are 5,852 less than carload ratings and 4,235 carload ratings, the carload ratings being 72.4 per cent of the less than carload.

In the Southern Classification 32.92 per cent of the less than carload ratings are in the fifth, sixth, and lettered classes; in Western Classification there are no less than carload ratings below fourth class, and in the Official Classification only 1.25 per cent of the less than carload ratings are below fourth class. Of course there are certain articles, such as coal, upon which no less than carload rate is named and certain other articles upon which no carload rate is made, so that it does not follow that each article having a carload rating has also a less than carload rating, or vice versa; but, assuming that the articles of one class are offset by those of the other, it would follow that in southern territory the forwarding agent could combine for the purpose of a carload rating only 22 per cent of the articles having less than carload ratings; in western territory only 29 per cent of such articles; while in Official Classification territory 72 per cent of such articles could be combined.

The natural reflex of these fundamental differences regarding the combination of shipments of single ownership is found in the rules respecting the combination of less than carload shipments of different owners. Where the former privilege is allowed the latter is denied.

55 This result is perhaps to be expected when considered from the standpoint of the carriers' revenue. In Official Classification territory, where the individual shipper can combine into mixed carloads and forward at carload rates practically all of his products,

if there were added the privilege of the forwarding agent to combine and forward at carload rates the small shipments of different owners, it might happen that a large proportion of the traffic now carried at less than carload rates would be transported at carload rates and the carriers' gross revenue be reduced accordingly. On the other hand, in western and southern territory, where no such general privilege in respect of mixed carloads exists, and the forwarding agent is confined to the combination of a limited number of the same articles, such as two or more shipments of furniture or machinery, the effect upon the carriers' revenue is relatively unimportant.

Certain economic considerations are here suggested by the record in these cases. In our present state of industrial development the interchange of commodities involves two necessary factors—a person offering goods for shipment and a carrier transporting the goods so offered. The former finds his compensation in the production and sale of commodities, the latter in their carriage. Generally, then, the cost of a commodity at the place of consumption will be the sum of the cost of production and the cost of transportation; and any additional cost must result from the presence of another factor which is unnecessary and, from an economic standpoint, unwarranted. The intervention of the middleman, in this case the forwarding agent, means another person who must make his living out of the transportation. In the last analysis the consuming public must support the carrier and the forwarding agent in place of the carrier alone. Nor does it answer this to say that the forwarding agent actually decreases the aggregate expense because the goods are carried

56 to destination for less than would have been paid if the several shipments had been forwarded at the less than carload rates.

The real significance of this contention is that the carload and less than carload rates do not bear a proper relation to each other, if the forwarding agent can be supported and the shipper at the same time make a profit out of the difference between the rates. Obviously, the forwarding agent does not desire to do away with the present system of carload and less than carload rates, nor to reduce the difference between them, for the greater the difference the wider is his opportunity. His real object is not to secure a readjustment of rates which shall more accurately measure the carriage of carloads and less than carloads, much less to remove the differences based upon quantity, but to secure the right to carry on a "bargain counter" business under existing conditions.

As we have seen, the Official Classification has nearly three times as many carload ratings as the western and more than four times as many as the southern, and almost any combination of goods of the same ownership may enjoy the carload rate. Add to this unlimited privilege the right of the forwarding agent to combine shipments of diverse ownership and the undoubted result—the aggregate amount of traffic remaining the same—would be a large increase in carload shipments with a corresponding decrease in the less than carload.

That is to say, a considerable portion of the traffic now carried at less than carload rates would then be carried at carload rates, and it is evident that the gross revenue of the railroads would be seriously decreased. Whether their net revenue would be diminished depends upon a variety of considerations, but there is good reason to believe that it would be materially reduced.

57 Railroads are common carriers of both carload and less than carload freight. As such they have provided facilities for less than carload shipments, including terminals in cities, freight houses, transfer platforms, clerical forces, and the like. Even if the forwarding agent and consolidator are allowed to do business, the railroads will still be obliged to handle a considerable amount of less than carload traffic and consequently must maintain their present facilities and fixed expenses. The less than carload plant, so to speak, would have to be maintained on a diminished revenue. Whether the result would be increased less than carload rates or poorer service for less than carload shipments is of course a matter of speculation.

It does seem certain, however, that the advantages of carload rates could not be obtained by the large number of shippers who are located in small communities where such agencies as the complainant's would not be available. To a certain extent such industries could perhaps send their shipments to the nearest center supporting a forwarding agency, and have them transported thence at carload rates; but at best the isolated shipper would be handicapped by the amount he would have to pay to reach a forwarder, and this disadvantage might drive him from the field. It seems fairly evident that the free use of the forwarding agent would operate to the injury of the smaller towns and tend strongly to the concentration of industries in the large cities. Indeed, witnesses for the interveners virtually admitted that the change sought by them might result in the ruin of manufacturers not located at commercial centers, but this, they suggested, would be merely another illustration of the "survival of the fittest." In other words, the transportation charge paid by a shipper on a given amount of less than carload traffic would not be determined by the service he sought from the carrier, but

58 would depend upon whether he was so situated as to be able

to combine with other shippers.

It also appears probable that the privilege for which complainant contends would be a serious disadvantage to the smaller jobbing towns and their wholesale houses. It must be remembered that nearly all purchases by retailers, except a few in the larger cities, are of less than carload quantities, and it is a matter of common knowledge that the extent of territory in which a jobber can do business is largely a matter of rates. The wholesaler at the smaller jobbing center finds his opportunity, to a great extent, in the fact that the carload rate from the primary market plus the less than carload rate to the town of the retailer is lower than the less than carload rate from the primary market to the same ultimate destination. Now, if the forwarding agent is entitled to the privilege

claimed, he can take away this advantage of the interior jobber by making the rate from the primary market substantially the same as the carload rate to the jobber plus the less than carload rate to the retailer. The cost of laying down the goods in the retailer's store is not reduced and consequently there is no benefit to him or to the consumer; but the advantage of the jobber in respect of rates is taken away and the forwarding agent becomes in effect the middleman.

Therefore, apart from all other considerations, it would seem that the privilege contended for by complainant involves the following results: (1) A saving in freight rates and an increased opportunity to reach distant markets on the part of the shipper who can use the forwarding agency to advantage; (2) a decrease in less than carload and an increase in carload traffic, with a probable net loss in the carriers' revenues, which might necessitate a reduction in less than carload service or an increase in less than carload rates; (3) serious injury to manufacturers in small towns who could not use the forwarding agent; (4) the loss to wholesalers in the interior jobbing towns of the rate advantages they now enjoy, or at least a material reduction of those advantages, without benefit to the retailer or the consumer; (5) opportunity for discrimination between shippers which would be criminal if indulged in by the carriers.

Whatever weight might be given to these matters if the case depended merely upon the reasonableness of defendants' regulations, it is nevertheless earnestly contended that the regulations in question violate the arbitrary rule of law laid down in section 2 of the act, in that they result in different charges for like and contemporaneous service in the transportation of like kind of traffic under substantially similar circumstances and conditions. This contention calls for a careful consideration of the language of section 2 and its interpretation by the courts. For convenience, the section is quoted in full:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The prerequisite to the application of the rule of this section is a finding of fact that the two kinds of traffic under comparison are like in kind, contemporaneous in movement, and carried between the same points under substantially similar circumstances and conditions.

60 The real difficulty seems to lie in determining what considerations may be taken into account in deciding whether or not the circumstances and conditions of transportation are substantially similar. This leads to a review of the judicial decisions upon the subject, and particularly those relied upon by complainant.

It is insisted that section 2 of our act is virtually a re-enactment of section 90 of the English Railway Equality Clauses Acts and that the English courts prior to the enactment of our statute had construed the English act to require the privilege to the forwarding agent (known in England as the "intercepting carrier") here asked by complainant. In support of this position, great weight is laid upon the decision in Great Western Ry. Co. vs. Sutton, 4 Eng. & Irish App., 226, decided by the House of Lords in 1869, in an opinion by Lord Chelmsford, wherein the previous decisions bearing upon the right of the intercepting carrier in respect of freight rates were reviewed and analyzed.

That the English decisions are entitled to great weight in arriving at the proper construction of our own act is not to be doubted, and this has frequently been asserted by the Supreme Court of the United States. I cannot agree, however, that the Sutton case is in any sense controlling, because, as I read that decision, the facts upon which it rests are essentially different from those now under consideration. In the first place, the Sutton case was an action at law to recover back money paid by the intercepting carrier in alleged violation of the equality clauses. The question of fact as to whether the circumstances and conditions of carriage were substantially similar was submitted to a jury in the lower court and the jury found for the plaintiff. In discussing the case, Mr. Justice Blackburn said:

"The next objection is that the circumstances are not the same.
I do not think it can be said, as a matter of law, that
61 they are the same, but I think the jury might, on the evidence,
properly draw the conclusion that they were. I have already
intimated to your lordships my opinion that the circumstances must
be those relating to the carriage, not to the consignor, and that the
fact that the plaintiff was a rival carrier does not in itself make a
difference in the circumstances such as to justify a difference in the
charge under the statute."

In other words, if the jury had found for defendant, as the court intimated they might have done, and as the dissenting judge said they ought to have done, the decision would have been against the intercepting carrier. Whether the verdict of an English jury, which confessedly might have found either way, would be binding upon the Commission is more than doubtful; but that is not the point which vitally affects the weight of the English decisions.

The real reason, as stated above, is that the facts upon which the intercepting carrier claimed relief were essentially different from the facts shown by this complainant. Briefly, the facts in the Sutton case were these: The intercepting carrier combined packages into what were known as "packed parcels," weighing less than 500 pounds, each

parcel containing packages from several consignors directed to several consignees. The railroad had a tariff providing that such combined shipments would be charged 50 per cent above the rate applicable to a package of similar size sent from one consignor to one consignee, and it enforced the higher charge against the intercepting carrier but did not enforce it against other members of the public. This appears from the following language of Chief Justice Tindall, of the Court of Common Pleas, in Parker vs. Great Western R. R. Co., 7 M. & G., 252:

"The third head of claim arises out of an alleged difference in the charges made by the company to the public at large and to carriers for the conveyance of goods, such difference not being directed against any individual carrier, but against all carriers as contradis-

tinguished from individuals of the public at large. As to this

difference, the case states that, when one of the public has brought several packages of goods and paid the charges, the company have charged him on the weight of the aggregate, although they may have belonged to different consignees; also if several of the public have brought several packages addressed to one consignee, who was to pay the charges, such consignee has been charged upon the weight of the aggregate; but if a carrier has brought several packages consigned by or to different individuals, he has been charged upon the separate weight of each, unless it was known that more than one package belonged to the same sender, and was going to the same consignee, in which case all belonging to the same sender and going to the same consignee were charged upon their aggregate weight. And in all such cases where carriers were concerned, the company dealt with and recognized the carriers only as their consignor and consignee of the goods. The case further states that on all occasions when the company have carried goods for the plaintiff they have dealt with him only, and have refused to recognize any other person either as consignor or consignee. It appears to us, then, that the company are bound to treat the plaintiff as consignor and consignee for all purposes, including the mode of charging in the aggregate, and that they have no right to make a distinction in that respect between him and any other individual member of the public."

That the facts in the Sutton case were substantially dissimilar is also shown by the following extract from the decision:

"The plaintiff is a carrier in London, and his principal business is to collect parcels of goods for various wholesale houses, to pack them together in one parcel and send the parcel so packed by the defendants' railway to his agents in the country, who unpack and distribute the inclosed parcels to different persons to whom they are addressed. The carmen of the plaintiff who convey the parcels to the railway station always take with them a printed form of declaration with different headings, furnished by the defendants, among which are columns for the names and address of the consignee, the description of packages and contents, and at the foot of the declaration is a notice that 'all parcels of goods and packages, the contents

of which are not properly declared by the senders, will be charged with the highest class, and all such parcels of goods and packages not exceeding 500 pounds in weight, if the contents shall not be declared, will be considered as each containing different kinds of articles, and each such parcel of goods and package will accordingly be subject to the regulation relating to 'smalls' and charged for accordingly.

" Before the goods leave the plaintiff's office he fills up the
63 different columns of the declaration, except those headed re-
spectively 'weight,' 'paid,' and 'remarks,' and every parcel
containing several parcels of different kinds of goods is always de-
scribed by plaintiff as 'packed.'

" The defendants charge for the carriage of goods according to
their nature and description by a tariff headed 'rates from London,'
'on goods and parcels about 1 cwt. and under 500 pounds by luggage
trains,' containing five columns of increasing rates of charge and a
column headed 'class—packed parcels,' stating the charge for them to
be '42s. 6d.' (being the charge at the fifth or highest rate), 'and 50
per cent.'

" All the packed parcels carried for the plaintiff were charged at
this rate, which, looking to the plaintiff's parcels only, would be a
correct charge. But the ground of the plaintiff's action against the
defendants is that they have been in the habit of charging the packed
parcels of other persons carried by their railway at a lower rate than
they charged the packed parcels of the plaintiff, which, he contends,
by their acts of Parliament they have no right to do. For the pur-
pose of proving this difference of charge the plaintiff produced the
evidence (which was excepted to) of certain wholesale warehouse-
men and drapers in London who were in the habit of inclosing in
one package or hamper various descriptions of goods not only for
their own customers, but also for the customers of other houses; and
he proved that the defendants always charged for the carriage of
their packed parcels at the fourth-class rate in the tariff, being the
rate appropriated to drapery goods, and never charged the extra
rate of 50 per cent on any of their packages.

" One witness (the clerk of Messrs. Morley, warehousemen) stated
that the defendants were perfectly aware of the practice of the houses
as to packed parcels, but that they could not tell from the outside of
any particular parcel whether it was packed or not. The plaintiff
also gave evidence (which was excepted to) that in the year 1849,
upon an arbitration between another carrier and the defendants, wit-
nesses proved, in the presence of the defendants, their solicitor, and
traffic manager, the practice of houses in London of packing parcels
together containing the goods of various persons and sending them
by the defendants' railway, and that the practice of packing parcels
had been for the last forty years so general as to be notorious among
carriers.

" Upon this evidence the learned judge directed the jurymen that
there was evidence upon which they might find that parcels had been
carried by the defendants for other persons containing goods of a

'like description and under like circumstances' at a less rate than such goods were carried by them for the plaintiff, and also upon which they might find that the defendants knowingly and purposely charged the plaintiff more than other persons. And upon this direction the jury found a verdict for the plaintiff."

64 In other words, the Sutton case would be analogous to a case in this country where a forwarding agent who had consolidated several shipments of different ownership and for different consignees was charged a higher freight rate than other persons for whom similar consolidated shipments were carried. But the defendant railroads provide the same rate for all consolidated carloads, namely, the less than carload rate on various packages. This practice was not held to be a violation of law in the Sutton case; in fact, it seems by inference to be approved, when the court says: "All the packed parcels carried for the plaintiff were charged at this rate, which, looking to the plaintiff's parcels only, would be a correct charge." The language quoted seems fairly to convey the idea that a higher charge might properly be made for a packed or consolidated parcel than for a single parcel of similar size. So that, if my understanding of the Sutton and prior cases is correct, they really favor defendants' present rules.

Moreover, there are radical differences between the historical relation of the intercepting carrier to the English railway and that of the forwarding agent to the American railway. In England the forwarding agent is a carrier; in the United States he is not. Several other distinctions are pointed out by the Circuit Court of Appeals in Detroit, G. H. & M. Ry Co. vs. I. C. C., 74 Fed. Rep., 803, 809:

"At first, in England, if not here, the conception of a railroad was that it was, like the king's highway, open to all who wished to go upon it for the transportation of goods along its lines, and the earliest acts authorizing their construction, proceeding upon this theory and the rules contained in the legislation for the regulation of the 'tolls,' 'tonnage,' 'rates,' and 'charges,' were based upon that conception of their use. The idea that the railroad owner should be himself a carrier of goods was at first almost wanting in the legislation concerning railroads. Very soon, in the process of evolution, he was

65 authorized to become a carrier, others having the right, however, to share that business with him; the railroad owner most conveniently furnishing the motor power, whether of engines or other kinds, the trucks and carriages, just as he furnished the roadbed and lines of rails, and this whether he himself or some other contractor was the carrier of goods. But the business of carriage was at first almost exclusively in the hands of other contractors than railroad owners, they occupying a relation to the lines of railway very much like that which in our day the express companies in this country bear to them, only the business of these 'carriers' was much more extensive, embracing all goods, as well as small parcels, for quick delivery. Paying the railroad company its 'tonnage,' 'rates,' 'tolls,'

and 'charges' for the use of the road, these outside carriers depended largely, if not wholly, for their profits upon compensation for the accessory service of collection and delivery, including particularly the cartage of the goods. Naturally they charged a lump sum to their customers, which covered the compensation for their own accessory service and the charges which they paid to the railroad company, there being no separation or distinction between the two, any more than in the old-fashioned land carriage, as far as the shipper was concerned, but in the settlement between the railroad company and the 'carrier' the distinction appeared."

We may now proceed to examine the other American decisions in an attempt to ascertain what facts may be considered in determining whether or not the circumstances of carriage are similar, and perhaps a chronological review of the leading authorities will be the most convenient.

The first important case construing section 2 is that of the Circuit Court in *Interstate Commerce Commission v. B. & O. R. R. Co.*, 43 Fed. Rep., 37, decided in 1890. The Commission had ruled that the sale at reduced rates of a party rate ticket for the transportation of ten or more persons unjustly discriminated against other passengers. This ruling was disapproved by the Circuit Court in an opinion containing the following comment upon this section:

"Again, the testimony establishes that party-rate tickets secure patronage that yields large revenues to the respondent and that the withdrawal of those tickets would almost entirely destroy that patronage, for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers. Are all these considerations to be left out of the account in determining whether there has been 'like and contemporaneous service' 'under substantially similar circumstances and conditions?' Does it depend solely upon whether party-rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are traveling from the same point to the same destination? Is that the full meaning of 'similar circumstances and conditions?' The answer—which the question itself seems to suggest—is that the phrase has a much larger and more comprehensive meaning, else Congress could not consistently have recognized mileage, or excursion, or commutation tickets, for all these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation, the phrase must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons; or, in other words, circumstances and conditions of a commercial character, which, while they should not exclude or override the consideration of what is just and reasonably advantageous to those not so situated as to be able to avail themselves of reductions offered to the general public, should be so recognized as not to be prejudicial or unjust to any, and yet, upon the whole, to promote the interest of all concerned in the beneficial operation of the act."

The Supreme Court of the United States affirmed the decision of the Circuit Court in 1891 (145 U. S., 263). While the foregoing expression of the Circuit Court was not commented upon, the Supreme Court seems in substance to hold that even under section 2 some consideration may be given to the business interest of the carrier and other matters which, although intimately related to the matter of carriage, occur either before the traffic is offered to the carrier or after its delivery at destination. Referring to section 22, the court says:

"It may even admit of serious doubt whether, if the mileage, excursion, or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel 1,000 miles, or to go and return by the same road, is a 'like and contemporaneous service under substantially similar conditions and circumstances' as is rendered to
67 a person who travels upon an ordinary single-trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same state must be illegal."

In 1896 the Supreme Court decided the case of T. & P. Ry. Co. vs. I. C. C., commonly known as the Import Rate case. Without going into the facts of this case it is sufficient to quote what is therein said of the meaning of section 2. The language of the court is as follows:

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions in any case coming before the Commission requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission."

It may be observed that Mr. Justice Harlan, in his dissenting opinion, contended that the fact that one shipment originated in Europe and the other in New Orleans was not a fact which would render dissimilar the transportation of the two classes of freight from New Orleans to San Francisco, but the majority of the court apparently did not agree to this proposition.

The case of Wight vs. U. S., 167 U. S., 512, decided early in 1897, turned directly upon the application and meaning of the words "circumstances and conditions" as used in section 2. This case is dis-

cussed at length by interveners and defendants, and should be carefully analyzed, in order that its meaning may not be misconstrued. These facts appeared:

One Breuning, a dealer in beer at Pittsburg, had a warehouse adjoining the track of the Pan Handle Road, and beer shipped by that line from Cincinnati was delivered directly into his warehouse at the tariff rate of 15 cents. The warehouses of his competitors at Pittsburg were not located upon either the Pan Handle or the Baltimore & Ohio roads, and beer transported from Cincinnati to Pittsburg for these competitors by either line had to be carted from the station to their warehouses. The rate by both lines being 15 cents, it was of course to Breuning's interest to ship by the Pan Handle, as he would thereby obtain delivery into his warehouse and save cartage charges. For the purpose of obtaining a part of Breuning's business, the Baltimore & Ohio allowed him the cost of carting beer from its station in Pittsburg to his warehouse upon the Pan Handle tracks, and the question before the court was whether such allowance violated section 2. In disposing of the case Mr. Justice Brewer used the following language:

"Whatever the Baltimore & Ohio company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. * * * And section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to 'state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.' It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same

line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. It may

be that the phrase 'under substantially similar circumstances and conditions,' found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition."

It will thus be seen that the court held in this case that the words "circumstances and conditions," as used in section 2, refer to the matter of carriage by the line transporting the traffic, and not to the circumstances and conditions of carriage on a competing line. The court did not define the meaning of the term "matter of carriage."

and it seems therefore proper to seek the true meaning of that term in the earlier decisions which have been noted.

United States vs. Chicago & Northwestern Ry. Co. 127 Fed. Rep., 785, decided by the Circuit Court of Appeals in 1904, involved the right of the United States Government to claim the benefit of defendant's party rates for the transportation of soldiers. The court held that the Government was not entitled to the party rate, assigning as reasons which constitute dissimilarity in the circumstances and conditions of carriage between the ordinary party using the party-rate ticket and the Government's soldiers, the following:

"1. The party-rate ticket is limited, whereas the Government requires a ticket of unlimited service.

"2. The Government does not pay in advance for its ticket, but only settles after a considerable period of time and often after much annoyance and inconvenience and sometimes actual deduction.

"3. Many amusement companies and similar organizations could not travel if obliged to pay the regular rate of fare. The giving of these reduced fares stimulates this kind of business and adds to the revenues of the railways without any corresponding increase in the cost of operation.

70 "4. While these tickets are only sold from point to point on the line of a particular railway, it is reasonably certain that the company will buy more than the one ticket in going from place to place.

"5. The traveling of amusement companies stimulates other kinds of travel. The performance of a great singer at some point upon the line of railway might induce hundreds of other persons to buy tickets to the same point, while the movement of ten soldiers would have no such effect.

"6. The Government is not in any way in competition with any other members of the public in the movement of its troops, and hence there can be no unjust discrimination."

Whether all of the reasons assigned could properly be considered by the court, in view of the decision in the Wight case, was seriously questioned by the majority of this Commission in its opinion in the Matter of Party-Rate Tickets, 12 I. C. C. Rep., 95, decided April 8, 1907; but the fact remains that the United States Circuit Court of Appeals, composed of Judges Groskopf, Baker, and Bunn, did consider the facts mentioned as constituting dissimilarity of circumstance and conditions, and this in a decision rendered seven years after the decision in the Wight case. Certainly the reasonable inference is that the Circuit Court of Appeals was of opinion that the reasons stated came with the term "matter of carriage," as used in the Wight case, as being conditions precedent or subsequent so intimately and indissolubly connected with the carriage, and so reacting upon the carrier as a result of the carriage, as fairly to come within the phrase "matter of carriage."

It is suggested that defendant's rules are such that it may examine into the ownership of property offered for transportation, and that

to sanction the rules in question is to hold that a carrier may make a difference in rates depending upon the person who offers it for transportation; that the rate made must apply to the shipment, not 71 to the shipper. But these suggestions do not go to the point in dispute. Of course it is not lawful to allow a difference in rates for the same service because one shipper is a farmer and another a physician, or to apply one rate upon a shipment where absolute ownership vests in the shipper and another rate upon a similar shipment where the shipper is merely a bailee.

But the case here presented involves a fundamentally different question, namely, whether a carrier, under section 2, may make one rate for a consolidated carload—made up of packages intended for various consignees at destination—and a different rate for a carload of like traffic intended for delivery to a single consignee. Is there such similarity between the two classes of traffic "in the matter of carriage" as will bring the carrier within the operation of the second section? It is not necessary to make any finding concerning the reasonableness of the difference in charges, for if substantial similarity be found unreasonableness will be presumed, while if substantial dissimilarity be found reasonableness will be presumed, so far as the second section is concerned. In other words, when substantial dissimilarity is shown the nonviolation of section 2 is established.

The English cases, as I conceive, did not involve the question now before us, but only decided that the same rate must be applied to all consolidated shipments, or packed parcels, regardless of the business occupation of the shipper. The only case in this country directly in point is the case of Lundquist vs. G. T. W. Ry. Co., et al., 121 Fed. Rep., 915, wherein the court denied the claim of the forwarding agent mainly upon the ground that the liability of the carrier to a greater number of suits in case of damage to a carload

72 owned by several persons created such a dissimilarity of circumstances and conditions as would avoid the operation of the second section. It is true that this basis for the decision has been more or less criticized. In the Buckeye Buggy Company case, *supra*, we expressed the opinion that although there may be weighty reasons why rules against forwarding agents can and should be adopted, liability to a greater number of suits is not a matter of practical importance. Nevertheless, the Lundquist case decided the precise question and is an authority not to be lightly disregarded.

It seems clear that the exceptions to section 2 expressly enumerated in the twenty-second section, the decisions of the courts, and the rulings of this Commission tend strongly to show that within certain limits the business interest of the carrier and the direct result of the transportation upon the revenues of the carrier may operate to create dissimilarity in the matter of carriage sufficient to avoid the operation of the second section. In the party-rate case the Supreme Court said that it may admit of serious doubt whether, if mileage, excursion or commutation tickets had not been mentioned at all in section

22, they would have fallen within the prohibition of section 2; whether the allowance of a reduced rate to persons agreeing to travel 100 miles, or to go and return by the same road, "is a like and contemporaneous service under substantially similar conditions and circumstances" to that rendered to persons who travel upon ordinary single-trip tickets.

The only difference between the single-trip and the excursion-ticket passenger between the same points is that the excursion passenger agrees to return by the same or some designated route, while the single-trip passenger may never return or may return by a different route. Although there is no difference, so far as the
53 physical transportation is concerned, there is a difference in the amount of traffic and revenue secured to the carrier.

Whatever may be said of the weakness of this argument, because such tickets are excepted by the statute itself, does not apply to the party-rate ticket, which is not mentioned in the statute, but is sanctioned by the Supreme Court under section 2. That decision might have been rendered verbatim as well after the Wight case as before, since the party-rate ticket is not justified by the competition of rival carriers, but upon the ground of the business interest of the carrier hauling the traffic. Says the court: "If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

Plainly there is no substantial physical difference in the transportation, between two given points, of ten persons who have combined themselves into a party and purchased a party ticket and of ten individuals who have not combined themselves into a party. The operation of section 2 is avoided by the party rate, not by reason of physical differences in the transportation, but by reason of increased traffic and revenue secured to the carrier. This case, read in connection with the Wight case, throws light upon what constitutes "the matter of carriage" and gives to section 2 a broader construction than is contended for by complainant. It may be added that any other holding would be inconsistent with the ruling of the Commission (Rule 53, Tariff Circular No. 15-A, p. 61), which recognizes the right of carriers to issue excursion tickets and to limit their use to members of a particular association or society or to delegates to a particular convention. This ruling, it is to be noted, has been reissued since the Commission's decision of April, 1907, in the matter
74 of party-rate tickets.

The Commission has also impliedly approved tariffs which provide a half rate upon machinery returned to a factory for repairs and ordered reparation upon the basis of such a tariff. Minneapolis Threshing Machine Company vs. C. R. I. & P. Ry Co., 13 I. C. C. Rep., 128. No such tariff can be legal if, in determining whether or not one shipment as compared with another is transported under substantially similar circumstances and conditions, the carriers and the Commission may not consider what happened before

the traffic was offered for transportation at the point of origin or after it was delivered by the carrier at point of destination.

If two pieces of machinery are sent to a factory for repairs, one of which originally came from the factory to which it is returned and the other from a different factory, it will hardly be contended that there is any difference in the physical carriage of the two shipments. The only distinction is that one of the shipments was originally carried out from the factory over the railroad by which it is returned. The difference in rate is justified, if at all, by a condition precedent to the offer of the shipment to the carrier for transportation to the factory. In like manner it would seem that proportional rates, special import and export rates, and other similar differences in rates, can be justified by the carrier making them only upon the basis of conditions precedent or subsequent to the particular carriage for which the lower rate is made. It would be extremely difficult, for example, to explain upon any other theory the lawfulness of a milling-in-transit rate from the milling point to final destination.

To sum up the decisions under section 2, we find in the Wight case
that competition of a rival carrier is not a differentiating cir-
75 cumsstance; that the section must be construed in uniformity
with section 6 and other substantive portions of the law.
Under the Party-Rate case the fair business interest of the carrier
may be considered as creating dissimilarity, subject to the general
prohibitions of the act against unreasonableness of charges and un-
just discrimination; and this seems to leave almost unqualified the
statement of the Supreme Court respecting the section in the Import-
Rate case:

"We think that Congress must have intended that whatever would
be regarded by common carriers apart from the operation of the stat-
ute, as matters which warranted differences in charges, ought to be
considered in forming a judgment whether such differences were or
were not unjust."

This does not in the least offend the principle of the Wight case, wherein it is announced that under section 2 consideration may be given only to the "circumstances" and "matter of carriage," for the Supreme Court has not defined the meaning and scope of the "cir-
cumstances" and "matter of carriage" otherwise than in the decisions prior to the Wight case, of which mention has been made.

Accepting the forwarding agent in the capacity in which he asks consideration as a shipper, I hold that there is such substantial dissimilarity of circumstances and conditions relating to the matter of carriage that the rule of the second section does not apply. The Supreme Court has held that where the circumstances and conditions of the particular carriage are such as to produce increased traffic and revenue to the line, as in the carriage of persons on party-rate tickets, such circumstances and conditions will justify the carrier in making a lower rate for a party than for persons who do not form a party; and if such circumstances may be considered when they operate to

76 increase the carrier's business, it certainly seems proper to consider the circumstances of a carriage which reduces the carrier's revenue.

The railroad is a carrier of both carload and less than carload freight. It is under legal obligation to furnish cars, engines, warehouses, truckmen, and clerks for the handling of less-than-carload traffic. Being under this obligation, it is difficult to see how the carrier can be forced, against its will, to allow a third party to come in and assemble and distribute its package freight and take the revenue which accrues from that service. If the forwarding agent may intervene in the transaction and perform the work of collection in cars and of distribution at the end of the carriage to the real consignees, it is evident that the operation diverts from the carrier to the forwarding agent whatever profit there may be in the accessorial service of loading, unloading, and billing and materially reduces the revenue which is properly applicable to the maintenance of the carrier's less-than-carload plant.

In the United States it would not be contended that the forwarding agent could require the carrier to give him the use of its tracks for the transportation of freight in the forwarder's vehicles; and it would seem that the carrier, being under the legal obligation to perform the carriage, may also lawfully claim the right to perform the incidental but really the integral part of the carriage, to wit, the consolidation of package freight into cars, and that the withdrawal of this service from the carrier constitutes a substantial difference in the matter of carriage.

The consolidation of an occasional carload of package freight and its carriage at carload rates would not appreciably affect the revenues

77 of a carrier. But under the conditions existing in Official Classification territory, where there is a carload rating for practically every article of commerce and an almost unlimited privilege of carriage at carload rates of different articles sent by one shipper to one consignee, it cannot be doubted that the change asked by complainant would materially diminish the carrier's revenue. If 1 per cent of a carrier's traffic were changed from the less-than-carload to the carload class, the result would be unimportant; but if, with no change in the aggregate volume of traffic, 50 per cent or even 20 per cent of its traffic were so transferred, the carrier's revenue might be so seriously reduced as to force an entire readjustment of its freight schedules. I am of opinion that these are matters of carriage which create substantially dissimilar circumstances and conditions and avoid the operation of the rule of section 2, more especially as no discrimination results against the real shipper of the goods.

It is not asserted that all the circumstances mentioned in the foregoing statement of the evidence may be considered as creating dissimilarity under section 2, but I am convinced that, for the purposes of this case, it is proper to take into account such facts as directly affect the business interest of the carrier, the interests of its less-than-carload patrons, who cannot use the forwarding agency, the somewhat

increased liability of the carrier in case of loss or damage to the goods and the fact that the forwarding agent undertakes to render a service for which the carrier has provided facilities, and to perform against the carrier's will an integral part of the carriage of small shipments. Moreover, the right of the carrier to make a carload rate and a higher less-than-carload rate is well established. To say that a carrier has the right to provide carload and less-than-carload rates, and yet can be compelled to allow carload rates on less-than-carload shipments
when combined by a forwarder or other agent, that the principle shall be denied what his agent can demand, is to advance a proposition which seems not only without support in the law but at variance with its provisions.

78 It is not only the right but the duty of the Commission to look through the form to the substance of a transaction. Courts and witnesses may sometimes be stopped in actions at law from considering or showing the real merits of a case by strict rules of evidence or pleading. But any such restriction upon the Commission would be against public policy, inasmuch as our decisions affect the shipping public and the carriers of the country generally, as well as the parties to a particular case. It is one of the best-known and most universal rules of equity that the right of the party having the beneficial interest rather than the party holding the mere legal title shall be considered and enforced.

Applying this principle to the present case, the real parties in interest are the carrier and the persons who desire to secure the transportation of less-than-carload freight. So long as each less-than-carload shipper is charged the published less-than-carload rate, either directly or through the agent whom he employs to ship his freight, he certainly can make no claim of unjust discrimination under the most ironclad construction of section 2. Viewed in this light, the elaborate argument of the forwarding agent fails to be in any degree convincing. He appears merely as a scalper of freight rates, a person who makes his living out of a scheme and device whereby his patrons secure transportation of less-than-carload shipments at rates less than those offered by the carriers' public tariff.

Indeed, it seems pertinent to inquire whether, if complainant's contention is correct, the publicity requirements of the act in respect of rates would not be virtually defeated. Clearly, the less-than-carload rates would not be those named in published tariffs,
79 but such as might be agreed upon between the forwarding agent and the shipper. And if the rates actually secured by less-than-carload shippers through the intervention of the forwarding agent are just and lawful, why should not the carrier be permitted to effects the same result by direct bargaining with the shipper? Can the same thing be lawful when done by the forwarder and a punishable offense when done by the carrier?

I do not concede that the forwarding agent is the real shipper, nor is he a cartman. The cartman performs his service and charges for it. That is the whole transaction. Neither he nor his charge has

any relation to the railroad or to railroad rates. But the forwarding agent exists by and through his relations to railroad rates. His opportunity to do business depends upon his ability to secure the transportation of a given article cheaper than the charges for its carriage if offered directly by the actual shipper, who is his client. The evidence before us shows that the general practice of the forwarding agent is to render a bill to the real shipper, showing separately the items of cartage and freight, and this is confirmed by the statement of intervenor's counsel at the hearing:

"**Mr. SLUSSER.** You do understand that it is your company that pays the freight rate on less than carload shipments, that you pay according to your weight a proportionate share of the freight rate from the point of origin to the point of destination, and that you simply pay the forwarding agent as a forwarder for shipping the goods."

This view is supported by such judicial definitions as I am able to find of the word "forwarder":

"A forwarder is one who, for compensation, takes charge of goods intrusted or directed to him, and forwards them; that is, puts them on their way to their place of destination by the ordinary and usual means of conveyance, or according to the instructions he receives. Where he has a warehouse for the reception and safe-keeping of the goods until they can be forwarded, he unites the twofold occupation

of warehouseman and forwarder. His occupation is further
80 distinguished from that of the carrier by the circumstance
that he has no interest in and receives no part of the compensation
that is paid for the carriage and due delivery of the goods. An
express company which holds out to the public that it will take goods
or parcels to be delivered at certain points or places, and which
receives a compensation for the carriage and delivery, is a common
carrier, and not a forwarder. *Place vs. Union Ex. Co. (N. Y.), 2 Hilt., 19, 25.*

"A forwarder of merchandise who maintains a warehouse for the receipt of goods and forwards them therefrom by common carriers to such destination is not a common carrier, nor liable as such. *Roberts vs. Turner (N. Y.), 12 Johns, 232.*

"A forwarder is a person who receives and forwards goods, taking on himself the expense of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight. *Schloss vs. Wood, 17 Pac., 910; 11 Colo., 287.*"

In the light of these definitions it is seen that the forwarding agent, as he appears in the present case, is quite different from the agent whose activities have been described in the foregoing decisions. He has no interest in the freight, but he has a decided interest in the freight rate. In the last analysis he is not paid by the real shipper of the goods for his services, but divides with such shipper the differ-

ence between carload and less-than-carload rates. If there were no difference between the two rates his occupation would be gone.

Looking at the substance of the transaction, it is apparent that the real shipper—the person who furnishes the goods, desires their transportation, and pays the freight rate—can make no allegation of discrimination, unjust or otherwise, for he is charged precisely the same amount as any other shipper of the same amount of like traffic between the same points. If the real shipper cannot complain, it is difficult to see on what theory his agent can do so. Holding, as I

believe we should, that when the forwarding agent collects traffic from various owners and forwards it to various consignees

81 he is not a shipper, but merely a forwarder, it follows that he has no just complaint so long as he is allowed the same rates as other forwarders; but no question of discrimination between forwarders is here presented. Moreover, the Supreme Court seems to have decided in the Wight case that the rule of section 2 applies only to shippers. Speaking of this section the court says:

"The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road, and to forbid it by any device to enforce higher charges against one than another."

This language tends strongly to support the idea that the section prohibits discrimination between shippers, not between physical car-loads of freight, and that so long as shippers are given equal rates for similar services no violation of the section occurs.

In order that the views herein expressed may not be misapprehended I add a summary of my conclusions and a brief statement regarding their application. The question whether circumstances and conditions are substantially similar within the meaning of the second section is a question of fact to be determined in each case as it arises. In determining this question of fact the Commission is not confined to the physical act or incidents of transportation, but may within limits take into account matters affecting the interest of carriers and the public which occur before the traffic is offered for carriage or after its delivery at destination. Upon the record in these cases, and for the reasons above stated, I find as a matter of fact that carload traffic offered by a forwarding agent or other person acting in a similar capacity, and consisting of less-than-carload shipments of diverse ownership, is not transported under substantially similar

circumstances and conditions as compared with like carload

82 traffic of single ownership; and from this finding it follows as a conclusion of law that the refusal of carload rates to such forwarding agent or other person is not "unjust discrimination" as that term is used in the second section. In other words, where the circumstances and conditions are in fact substantially dissimilar the carrier has the legal right, if it chooses to do so, to make a reasonable difference in rates. It is for this reason that the denial of carload rates to the forwarder is not unlawful.

But while substantial dissimilarity carries the right to make a difference in charges, it obviously does not compel a difference. The circumstances and conditions may be distinctly unlike and yet the rates properly the same. For example, the law does not require carload and less-than-carload rates on any commodity; it permits the carrier to apply a uniform rate, if it be reasonable, without regard to quantity. Therefore the allowance of carload rates on combined less-than-carload shipments of diverse ownership, although it cannot be compelled, is nevertheless not unlawful—indeed, may be commendable—if no undue preference results to the less-than-carload shipper receiving such allowance. Whether undue preference does result in a particular case is a question of fact to be determined in an appropriate proceeding. The carrier is free to exercise its discretion in this regard, subject to the prohibition against unreasonable and discriminatory charges.

Under the conditions prevailing in some sections of the country, notably in Western and Southern Classification territories, as outlined above, the carload rates accorded on consolidated shipments may be entirely proper and lawful. There is certainly no presumption that they operate with discriminating effect or are otherwise illegal. So,

too, there are certain commodities, such as fruits and vegetables,
83 for instance, which are largely produced in less-than-carload quantities, but which could not be marketed as they mature on the less-than-carload rates now established. To accommodate this traffic, which is often and perhaps generally handled by associations of growers, the carriers frequently allow carload rates on the combined shipments of different owners. I perceive nothing unlawful in this practice; on the contrary, it seems to be advantageous both to the carriers and the shippers. In short, there appears to be a legitimate field within which carriers may with propriety allow carload rates on shipments of diverse ownership. Under proper restrictions, and in accordance with suitable and definite provisions in tariffs or classifications, there can be no valid objection, so far as I am aware, to the allowance of this privilege, provided it does not operate with discriminating effect.

But that is not all the issue involved in these cases. It is one thing to say that carriers may in certain cases and under certain conditions allow carload rates on consolidated shipments; it is quite another thing to say that they must do so in all cases and under all conditions. This is the precise point in dispute, and I am constrained to decide it against the complainant. I do not undertake to say to what extent or under what circumstances a carrier may lawfully accord carload rates on shipments of diverse ownership, for no such question is here presented; I merely hold that no carrier can be compelled to allow carload rates on such shipments, because the circumstances and conditions of carriage are substantially dissimilar within the meaning of the second section. In my judgment, the forwarding agent, the commission dealer in freight rates, who seeks to buy trans-

portation at wholesale and sell it at retail on his own terms is not entitled to the order sought in these proceedings.

84 These considerations lead to the conclusion that the rules in question do not violate the second section of the act, and are therefore not unlawful.

I am authorized to say that Commissioner Harlan unites in this dissent.

No. 1280. California Commercial Association vs. Wells, Fargo & Co.

Submitted March 2, 1908. Decided June 22, 1908.

1. The law does not justify the classification of shippers with regard to their interest in property shipped.

2. Ownership of property tendered for shipment cannot be made a test as to the applicability of a carrier's rates.

3. In gathering several packages of goods together and shipping them under the carrier's rates on large shipments a shipper is not by device evading the law, but is legally availing himself of the rates which the carrier offers.

4. The cost of carrying a "bulked shipment" is not greater than the cost of carrying the same amount of freight at the instance of an individual owner. The charge must therefore be the same in each case.

5. The defendant's rule against "bulked shipments" is discriminatory, unreasonable, and incapable of enforcement.

6. A number of packages of merchandise, aggregating 16,000 pounds in weight, were assembled in New York by the complainant's agent and offered to defendant at one time and one place, con-

85 signed under one bill of lading to the complainant, a voluntary association of San Francisco merchants. Defendant's tariff provided a rate of \$8 per 100 pounds for shipments of 10,000 pounds and less than 20,000 pounds. Applying its rule as to "bulked shipments intended to be distributed by the consignee," defendant charged its parcel rate against each separate package. Held, that the rule against "bulked shipments" is illegal. Reparation awarded.

I. I. Brown and Vogelsang & Brown for complainant.

C. L. Brown and H. D. Pillsbury for defendant.

Seth Mann for Pacific Coast Jobbers and Manufacturers' Association, intervener.

T. B. Harrison, jr., by permission of the Commission, for Adams Express Co.

Report of the Commission.

LANE, Commissioner:

Complainant is a voluntary association of wholesale and retail merchants of San Francisco, Cal. Defendant is an express company incorporated under the laws of the State of Colorado and subject to the provisions of the act to regulate commerce as amended. De-

defendant operates over various railroad lines between New York and San Francisco.

On August 17, 1907, a number of packages of merchandise, aggregating 16,000 pounds in weight, were assembled in New York by the complainant's agent, the New York Dry Goods Shipping Company, and offered to the defendant as one shipment at one time and one place consigned to the complainant. On the above date the defendant's legal rate for the carriage of merchandise by express from New York to San Francisco in shipments of more than 10,000 pounds and less than 20,000 pounds was \$8 per 100 pounds. It its tariff filed with this Commission appeared the following:

"Special rates on merchandise in large lots between eastern offices and Pacific coast terminals reached exclusively by Wells, Fargo & Co."

RATES BETWEEN NEW YORK AND SAN FRANCISCO.

	Per cwt.
500 pounds and less than 1,000 pounds-----	\$12.00
1,000 pounds and less than 2,000 pounds-----	11.00
2,000 pounds and less than 5,000 pounds-----	10.00
5,000 pounds and less than 10,000 pounds-----	9.00
10,000 pounds and less than 20,000 pounds-----	8.00
20,000 pounds and over-----	7.00

The rule objected to and in accordance with which the package rate was applied to these shipments reads as follows:

"Rule 3. Bulked shipments intended to be distributed by the consignee.—This company will not permit anyone to do business over its own lines in competition with itself by means of bulked packages. Objectionable packages are those containing either several parcels gathered by a shipper from others or those containing several parcels actually intended to be distributed at destination among several persons. When any package appearing to be bulked is offered by any person believed to be engaged in the business of bulking packages, it must not be accepted until the shipper has satisfied the agent, either by credible statements or by exhibiting the contents, that the package is not of the objectionable kind above defined. If such satisfactory evidence is not furnished the package must be refused. If the shipper admits or it is found on inspection that the package is bulked, as above defined, it must be refused, unless the shipper prepays the regular charges on each parcel contained in the package.

"Agents must understand that they may only refuse the packages of persons believed on reasonable evidence to be carrying on the business above described, thereby competing with this company by using its facilities and cutting its rates.

"Agents can not refuse packages containing several parcels, shipped by one shipper for himself and destined in good faith to one consignee. If in doubt as to the course to be pursued in dealing with any suspected shipper, the agent must report all facts to his superintendent, and meanwhile accept all packages offered until otherwise

instructed. In case of any dispute or trouble the agent must immediately report all the facts to his superintendent. Packages must not in any case be opened by employees of the company, and if inspection is required it must be demanded of the shipper before acceptance for transportation.

87 " It is not intended that the foregoing instructions shall in any way change our rules in regard to shipments containing packages from several shippers to one bona fide consignee, which have been packed by its own agent or employe.

" For instance, if Smith & Co., of Chicago, buy goods from two or more houses in New York, and have their packages delivered to their local representative in New York, to be made up by him into one shipment, to be forwarded by express to Smith & Co., at Chicago, such shipment may be accepted and waybilled at the regular charge.

" It is intended, however, that the instructions referred to shall be carried out whenever a shipment is offered which is believed to contain packages to be delivered to more than one consignee, whether said shipment is offered by an individual, a business house, a local express or a packing company, except that bulked shipments from merchants to their own exclusive establishments, or exclusive employe elsewhere, may be accepted as heretofore.

" 'Exclusive establishment' or 'exclusive employe' must not be interpreted to mean local expresses or any other public agency or organization.

" Should any shipment be consigned to a local express or delivery company, at destination, agents must in all cases assume that it contains bulked packages, and before accepting same demand that it be opened for inspection. If shipper declines to comply with this request, the shipment must be refused.

" If opened and found to contain bulked packages, it must be refused, unless the shipper prepays the regular charges on each package contained in the shipment.

" Packages consigned to delivery companies, containing two or more packages, each bearing a separate number—for example, 1, 2, 3, etc.—will be treated the same as if the packages were addressed to separate individuals, and agents will exact a separate guaranteed charge on each numbered package.

" The rules relating to bulked packages will apply to consignments of separate packages of berries, butter, or any other property, all addressed to one consignee, but bearing thereon individual addresses or other marks, showing that the shipments are designed for separate consignees. (12943.)"

The application of this rule resulted in the collection of some \$676 in excess of the charges which would have been paid if the quantity rate had been applied. The complainant asks that the rule against bulked shipments be declared unlawful and that reparation be awarded in the amount of the excessive charges collected in accordance therewith.

88 The complainant contends that the rule in question is in violation of section 2 of the act to regulate commerce, which reads:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The Commission is thus confronted with the question whether a rule is lawful under which a carrier may look beyond the transportation of the property to its ownership and refuse the benefit of its bulk or quantity rates to shipments which are intended to be distributed by the consignee after delivery at destination. Before passing to the discussion of this question it may be well to deal with several subordinate propositions which are here urged by the defendant: (1) That the Commission is without jurisdiction in the premises and has no authority to grant the relief which is sought; (2) that the complainant has no legal status, and therefore cannot of right demand any service from the defendant; (3) that the complainant is a common carrier and cannot claim the benefit of another common carrier's transportation facilities.

First, the plea to the jurisdiction. Section 15 of the act gives the Commission full power to determine just and reasonable practices, and to order a carrier to cease and desist from any practice which the Commission may deem unjust and unreasonable. The power

thus conferred is amply sufficient to give the Commission jurisdiction over the subject-matter of this complaint, and it is enough to say that this power has been exercised continuously and without challenge.

The second objection that the complainant has no legal status and cannot rightfully demand service from the defendant is, likewise, without merit. Section 13 of the act provides that complaints may be preferred by "any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society." The complainant is clearly included within this category. The contention that an unincorporated association has no right to demand the service of a common carrier is a proposition altogether novel and startling.

Further, the defendant alleges that the complainant is a common carrier, and, in accordance with the doctrine of the Express Cases, 117 U. S., 1, cannot claim the benefit of the defendant's transportation facilities. The answer to this defense is that the complainant

is not a common carrier. The characteristics of a common carrier were pointed out with some care in the case of *Buckland vs. Adams Express Co.*, 97 Mass., 124-129:

"They exercise the employment of receiving, carrying, and delivering goods, wares, and merchandise for hire on behalf of all persons who may see fit to require their services. In this capacity they take property from the custody of the owner, assume right of possession and control of it, transport it from place to place, and deliver it at a point of destination to some consignee or agent there authorized to receive it."

The complainant does not hold itself out in any sense as a carrier—it does not transport goods; it does not maintain custody of them while in the course of transportation; in brief, it exercises no functions outside of those which are characteristic of the ordinary forwarding agent. Furthermore, the decision in the Express Cases

supra, which are relied on in this connection, covered only the 90 case where one common carrier sought to compel another to

put at its disposal a part of the actual machinery of transportation to the end that it might engage in the business of carriage over the latter's lines. By no possible interpretation, therefore, can the Express Cases be held in point. We have been unable to find authority supporting the position of defendants, while there is abundant and respectable authority to the contrary. *Brown vs. Denison, 2 Wend.*, 593; *Roberts vs. Turner, 12 Johns. (New York)*, 232; *7 Am. Dec.*, 311, 313, note; *Beale & Wyman, Railroad Rate Regulation*, sec. 97.

The fundamental and large question involved in this case is the right of a carrier to determine what shippers may use its published rates. It is the contention of the defendant that it may refuse to grant the bulk rate (which in this case is analogous to the carload rate made by a railroad) to any but single owners of such shipments so that to permit any other use of the rate would be to induce many shippers of small packages (less than carload shippers) to unite their shipments in order to secure the lower rate applicable to large shipments, and thus the forwarding agency would come into being—an agency which could cut the package rate, render such rates unstable, grant preferences, and effect discriminations contrary to the spirit of the act to regulate commerce. To protect themselves against the creation of such agencies the rule has been drafted which has been quoted above. The effect of such rule has been seen in this case—a group of smaller merchants are denied a rate which a larger merchant is given; they tender the same number of packages of the same weight, containing the same goods as the large department store which is their rival, and they are charged a rate 50 per cent. higher upon their shipments. A rule which works such a result cannot be based on solid principle, even though it may have most specious and persuasive reasons to support it.

91 The express companies urge that unless such a rule is permitted shippers will form such agencies and no one thence-

forth will be able to tell what the real package or the less than car-load rate is. The forwarding agency will give one shipper one rate, a second shipper another rate, a third another, and so the very purpose of the act, the uniformity of rates as between shippers will be destroyed. We do not know that this will be so, but it is theoretically possible. The one certain answer to this argument is that the carrier makes but one rate and applies it without favor to each shipment that is tendered—to the small shipment the rate applicable thereto, and to the larger shipment its own fixed rate. The railroad or the express company offers to the world to transport a certain quantity of a certain character of freight for a certain definite amount of money, and it has no fair concern with the profit of the shipper or his interest in the property. It may ask that the shipment shall be what it purports to be in character and in weight, for that affects the rate; it may make reasonable rules to protect itself against a multiplicity of claims for loss or damage, for such claims ultimately affect the rate at which the carrier can afford to carry; it may refuse to accept the shipment except upon payment of the charges—these and no doubt other rules are properly within the carrier's prerogative, but we look in vain for authority to justify a classification of freight according to ownership. If we may hold as reasonable such a rule by which the utility of a rate is limited upon the carrier's knowledge of the persons to whom freight is really destined, we should be ready likewise to approve a rule which makes the right to use a rate depend upon the carrier's knowledge of the use to which

the article is to be put by the ultimate consignee—whether a
92 certain shipment of grain, for instance, is to be ground into flour, sown in the field, fed to cattle, or converted into liquor.

Where can we logically stop if we depart from the simple tests which may be put by the carrier's agent at the time of shipment: (a) Who offers this shipment? (b) Of what does it consist? (c) To whom, and where, is it bound? For its purposes as a common carrier the railroad or the express company needs no other information than may properly be elicited by these questions, and it would appear improper and unreasonable that it should be permitted to go into the vague and illimitable realms outside of and beyond such needs. The carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use, and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. To veer from this straight course, no matter to how slight a degree, or for what apparently beneficial purpose, is to lead away from the policy of the law which condemns discriminations and preferences.

The principle that a consignor who is not the actual owner of the goods which he offers for shipment incurs the same obligations as if he were the ultimate owner is distinctly recognized in the case of United States vs. Milwaukee Refrigerating Transit Co. et al., 145 Fed. Rep., 1007. In that case a refrigerator company, by arranging with a brewing company, took the custody of all shipments of the

brewing company, furnished the cars for transportation, negotiated with the railroads for shipping terms, the shipments being forwarded over the line of the road giving the most advantageous terms, and made final settlement with the railroad for the transportation furnished, the settlement allowing a certain rebate to the refrigerator company. The court says:

93 "But under the conceded facts, as we view them, the refrigerator company in its relations with the railroads appears in another rôle—that of shipper. From the brewing company and other owners of goods intended for interstate and foreign transportation the refrigerator company obtains the exclusive right to route the shipments to all competitive points, and then withdraws or gives the business according to the railroad companies' resistance or submission to the threat of diverting the traffic unless a tenth or an eighth of the freight moneys be paid to it. Control of the traffic is as absolute in the refrigerator company as if it were owner, and in numerous transactions the owner is not the shipper. And if an owner having full dominion in all respects conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper. In this case, if the refrigerator company bought the beer and paid the brewing company's bill, less freight, and then collected the beer accounts and paid the railroads seven-eighths or nine-tenths of the published rates, the granting of a rebate or concession by a carrier to a shipper would not be denied, we take it; and yet, so far as ledger balances and profits of the brewing company, the refrigerator company, and the railroads are concerned, the present method in its results is precisely that."

If the forwarding agent is to be held to the strictest compliance with the law respecting his obligations as a shipper, he must certainly be entitled, likewise, to the exercise of all a shipper's rights. The shipper is the one who tenders the shipment to the carrier and the law forbids discrimination between shippers.

Stress is laid by the defendant upon those provisions of the law which make it a misdemeanor for a carrier or a shipper "by any device" to evade collection or payment of the carrier's legally fixed tariff rates, and the use of a forwarding agent, such as the complainant, it is argued, is a device by which the "real shipper," the owner of the property, obtains the benefit of a rate not legally applicable to the traffic transported. The law is broad, clear, and explicit upon

94 this point. It is needless to quote here the many passages of the Hepburn Act and of the supplemental Elkins law that are intended to secure equality of treatment for all shippers. These provisions are not intended, however, to extend the jurisdiction of the carrier over matters outside of its province as a common carrier, nor are they intended to limit and prescribe the use which shall be made of the rates which the carrier puts into effect, for it is to be kept in mind that these rates on large shipments and on small alike are the carrier's own rates, instituted and maintained by it, and

so long as it chooses to maintain such rates we will not deny the public the right to use them.

In gathering several packages of goods together and shipping them under the carrier's rate on large shipments the shipper is not by device evading the law, but is, in fact, availing himself of the rates which, under the law, the carrier itself offers. The only shipper whom the carrier knows is the one offering the shipment, and the rate which this shipper pays is the lawful rate. The law condemns the use of a device to evade the payment of the lawful rate; it does not forbid the use of the rate. And so long as the carrier offers to transport a certain weight of goods at a fixed rate the shipper of these goods is certainly not evading the law by paying this rate.

The act to regulate commerce must be read as a whole, and no portion thereof is more definite or of greater public value than those provisions aimed at discrimination and preference, which, under the decisions of our courts, prohibit a classification of traffic upon the basis of the nature or character of consignees or consignors. A different rate may be given to the larger shipment, but it must be justified upon transportation conditions. The rate is made as applying to the shipment—not to the shipper.

The Supreme Court has placed the seal of its approval upon
95 the issuance of party rate tickets upon the ground that the increased travel and resulting economy of operation constitutes such dissimilar circumstances as to justify the apparent discrimination against the individual passenger. I. C. C. vs. B. & O. R. R. Co., 145 U. S., 263. The argument against bulking shipments is analogous, for if it is proper for individuals to secure reduced passenger rates by means of combination it is equally lawful for them to secure reduced freight rates by means of combination. In each instance there is a resultant economy in operation which justifies the apparent discrimination. In the party rate case it was the carrier who was upholding its right to permit combination and make a lower rate for a number of passengers than was extended to one passenger; in this case it is the carrier who is discriminating against the combined shipments by making a rule which under like transportation conditions and circumstances gives one rate to one shipper and a different rate to another.

The Supreme Court has further held in the case of Wright vs. United States, 167 U. S., 512, that the phrase "under substantially similar circumstances and conditions," as found in section 2 of the act prohibiting discrimination, refers to the matter of carriage. In so holding our court has followed the rulings of the English courts, the sections of the act to regulate commerce directed at discriminations and undue preferences being taken in large part from the English law, and the construction thereto given by the English courts has been regarded by the courts with such strong favor that these decisions are spoken of by the Supreme Court as being "incorporated into our statute." I. C. C. vs. B. & O. R. R. Co., supra.

The leading English case dealing with the interpretation of their law as to discrimination is Great Western Railway Co. vs. Sutton, 4 L. R., 226, in which it was held that a carrier could not properly withhold from forwarding agents the privilege of bulking shipments, and thereby obtaining the benefit of quantity rates, Lord Chief Justice Blackburn saying:

"I have already intimated to your lordships my opinion that the circumstances must be those relating to the carriage, not to the consignor, and that the fact that the plaintiff was a rival carrier does not in itself make a difference in the circumstances such as to justify a difference in the charge under the statute."

And in a still later case, Denaby Main Colliery Co. vs. Manchester Ry. Co., 11 Appeal Cases, 97, the lord chief justice said:

"I think it finally settled that for passing over the same portion of the railway the obligation to charge in respect of goods of the same description equally is imposed if they are under the same circumstances, and that the circumstances are those relating to the carriage of goods and not to the person of the sender."

There is but one case in the United States in which the point here involved has been passed upon. In Lundquist vs. Grand Trunk Western Railway, 121 Fed. Rep., 915, a decision was rendered against the right of the forwarding agent to combine less than carload shipments of different owners into carload lots and thereby secure the carload rate. This decision is discredited by Judson in his work on interstate commerce (sec. 157) and is not in line with the above-cited decisions of the English courts. In the Lundquist case the learned judge of the Circuit Court refused to follow the English courts, although in a more recent opinion by the same circuit judge (United States vs. U. S. Express Co., decided in April of this year) we find the cases which were repudiated in that case quoted as authority, and this comment made:

"The portions of sections 2 and 3 which refer to unjust discrimination and undue and unreasonable preference are modeled from the English tariff act, and the constructions placed thereon by the English courts is deemed, to say the least, very persuasive. Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S., 263; Interstate Commerce Commission vs. Alabama Midland Ry., 168 U. S., 144; Texas & Pacific Ry. Co. vs. Interstate Commerce Commission, 162 U. S., 197."

It is our opinion that these provisions of the act to regulate commerce aimed at discriminations and preferences do not permit a carrier to deny the use of a published rate by distinguishing between those offering shipments for transportation. This is an unjust discrimination and undue preference, not arising out of any transportation consideration, but arbitrarily created by the carrier for its own purposes.

Ownership cannot be made a test as to the applicability of rates, for diversity of ownership does not differentiate the service which the carrier gives. Unless there be a difference in the conditions of car-

riage there can be no difference in charges under section 2 of the act as interpreted by the Supreme Court.

Basic theories of transportation support the principle which the courts have established. In the case of Burlington, Cedar Rapids & Northern Ry. Co. vs. Northwestern Fuel Co., 31 Fed. Rep., 652, the court, speaking by Mr. Justice Brewer, condemned as illegal a contract discriminating in favor of the large shipper, based solely on the amount of transportation. The court said (p. 655):

"That such a discrimination is against public policy and not to be sustained I am very clear. On the face of it it is a discrimination based not upon the cost of transportation, upon the time and labor and annoyances which may result to the railroad company, but solely upon the amount of transportation. * * * If it be true, as held by Judge Wallace, that the rule forbidding an unjust discrimination does not necessarily prevent a railroad from charging a less rate to one who ships a large quantity than to one who ships a small quantity (and I am not prepared to deny that, under some circumstances, there

is force in that proposition, on the same principle that a whole-
98 sale dealer sells a large bill of goods at a less rate than a small
bill of goods), yet, even with that limitation, a discrimination so vast as this is, and so purely arbitrary, and which is so obviously solely in the interest of capital and not based upon reasonable distinction in favor of a large as against a small shipper, cannot be sustained."

In the case of Kinsley vs. Buffalo, New York & Pennsylvania R. R. Co., 37 Fed. Rep., 181, the court said:

"This charge is justified by the master upon the ground that the quantity of oil shipped by another shipper was much larger than that shipped by the petitioner, and hence that the larger proportion of expense attending the handling and transportation of the smaller shipment warranted a higher rate than was charged for the larger shipment. In this conclusion we do not agree with the learned master. It does not differentiate the service performed for several shippers nor the conditions and circumstances under which it was performed. The only difference is that in one case the quantity shipped was larger and in the other case it was smaller. This has been repeatedly held to be an insufficient and unwarrantable reason for discriminating rates of charge."

In the case of Scofield vs. Lake Shore & Michigan Southern Ry. Co., 2 I. C. C. Rep., 67, the Commission outlined the reasons which justify lower rates on larger shipments than on smaller ones as follows:

"Reasons that are substantial exist for making the rate lower per barrel in carload lots than in less than carload quantities. The cost of service is very considerably less in the case of shipments in carload lots than in less than carload quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the carload goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The

freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the waybill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than carload quantities. There is but one collection of charges for freight.

"Where the shipment is made in less than carload quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on 99 the waybill. The shipment is by a local freight train, which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a carload shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation."

It appears thus to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service. It necessarily follows that when this difference in the cost of service is eliminated, the reason for the discrimination entirely fails. It becomes, therefore, important to determine whether a carrier is subjected to greater expense when transporting a "bulked shipment" than when transporting the same amount of freight owned by a single individual. The only element in the defense looking to the cost of operation is the argument that the carrier may be subjected to a multiplicity of suits by the various owners. While this contention may appear theoretically substantial, we think it is entitled to no practical weight. In the first place, it is proper to observe that claims for damages are not regularly incident to the carrier's service; they are the exception and not the rule, and when they do arise there would seem to be no difficulty in the way of their being settled with the actual shipper, whether he be owner or not. We know of no legal objection to the carrier's stipulating that claims for damages shall be preferred only by the consignor or consignee designated in the bill of lading. Even without this protection, it probably makes no material difference to the carrier whether a damage claim is divisible or not. In the case of Buckeye Buggy Co. vs. Cincinnati, Cincinnati, Chicago & St. Louis Ry., 9 I. C. C. Rep., 626, the 100 Commission said in answer to this identical question:

"To a lawyer this legal proposition may well seem to create a material difference in conditions; as applied to the actual transaction that difference is hardly substantial. Claims for loss or damage to property in transit make up a very small part of the operating expenses of a railway. It has been frequently said in testimony before us that a risk of this kind is so small that it is not taken into

account in fixing rates and the relation of rates upon those commodities. If the liability itself is not considered, still less important is it who may bring suit for the damage."

We have no hesitation in concluding that when small packages are bulked and shipped under one bill of lading from a single consignor to a single consignee the extra expense incidental to the transportation of small packages individually is altogether eliminated. The cost of carrying a "bulked shipment" is not greater than when the same amount of freight is carried at the instance of an individual owner. Presumably the differential between the defendant's quantity rates and its rates on small packages is exactly equivalent to the difference in the cost of service. A greater differential would be illegal. When, therefore, the extra expense incidental to the handling of small packages is done away with, as in the case we are considering, the assessment of the carrier's quantity rates should render the transportation just as profitable as before. The carrier cannot legally insist upon applying its small package rates, because the entire basis for these rates has disappeared. If it is the purpose of the defendant's rule to maintain an unreasonable differential, we unhesitatingly decline to give our sanction to this rule. It is not the function of a carrier to promote the growth of the large shipper at the expense of the small shipper, nor to burden the large shipper with any

portion of the cost of giving service to his smaller competitor.

101 Judge Noyes, in his able work on American Railroad Rates, says (p. 103) :

"Allowances for quantity in the shape of a reduction for carload lots is not an unjust discrimination, but the general principle of an allowance for quantity—a preferential rate for large shippers—is indefensible. A merchant may charge less for his goods at wholesale than at retail. A private dealer may make concessions to obtain a large order. But a railroad is engaged in a business affected with a public interest and must treat all alike. Personal discriminations based on quantity, regardless of difference in cost, are wholly unjustifiable."

In considering the reasonableness of such a rule it is not to be overlooked that it is not practicable to enforce it. No carrier can know who is the owner of property offered for shipment, nor whether the shipments offered are intended for the consignee named or are to be distributed among other persons. The information of the Commission is sufficiently broad on this matter to state with authority that it is the business custom of many shippers to combine shipments; a group of farmers often purchase seed or fertilizer in small lots and ship in one name to one consignee in order to secure the carload rate; dealers in machinery, which is difficult to load and unload, unite their purchases for purposes of transportation; one or more of the great steel companies sells its products only in carload lots, and small dealers unite in the purchase of a carload, which is divided at destination; a great volume of the produce business of the country is handled at point of origin and destination by agents, who combine small ship-

ments, both by express and rail, ship to themselves, and sell upon commission at destination. Is it practicable on each of the tens of thousands of such shipments made each day for the carriers to make such examination at point of origin and point of destination as will justify it in permitting or denying the lower rate on the grounds stated in the rule? If the rule is valid, it must be enforced.

102 If not enforced in each proper case the carrier is guilty of departure from its tariff provisions and subject to the penalties provided in the act. The carrier may not be excused under such rule from making such examination into the facts as will surely protect it against charge of infringing the law—a mere superficial examination of the shipment would not satisfy the positive requirements of the rule if it were valid. And it must be apparent that no carrier could, with safety to itself, assume the responsibility imposed by such rule and risk the penalties which would follow its breach. A rule which it cannot enforce a carrier should not make and certainly this Commission should not approve.

The impracticability of enforcing such rule is shown in this case, from which it appears that shipments had been previously made by complainant without objection by the carrier. And it is a matter of common knowledge that such rule has been regarded more in the breach than in the observance. The enforcement of such rule, we feel safe in saying from the records of this Commission, would do incalculable injury; indeed, it would so affect transportation practices as to be nothing short of revolutionary. Few practices have become more firmly established in the transportation world than that of combining small quantities of freight of various owners and shipping at the relatively lower rates applicable to large consignments, and under this practice has developed an immense volume of traffic which otherwise could never have been brought into being. It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries and more surely establish the dominance of the greater industrial and commercial institutions.

103 There is a further element of discrimination in this case, and it is one which generally obtains among carriers who attempt to go into matters of ownership or distribution, which is worthy of mention. It appears from the carrier's tariffs that it will gather the various packages of various consignors which are destined to one consignee and ship them all at the bulk rate. Such rule manifestly permits the great department store or the wholesale dealer a privilege which is denied to the smaller merchant if the latter is not permitted to combine at point of origin his shipment with those of others.

Our conclusions are as follows:

Rule 3 of defendant, as quoted above, is unjustly discriminatory, unjust, unfair and unreasonable, in this: That it provides that defendant shall collect a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce

than defendant collects from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates. Defendant's rule against bulked shipments intended to be distributed by consignee is illegal. Complainant is entitled to reparation to an amount equal to the difference between the amount collected by defendant and the amount which would have been collected if defendant had applied the rate which under its tariffs is applicable to shipments of 10,000 pounds and less than 20,000 pounds in weight. The exact overcharge cannot be determined upon the record, but if the parties cannot agree as to the amount the case will be reopened for additional evidence.

An order will be entered in accordance with these conclusions.

104 HARLAN, *Commissioner*, dissenting:

All that is said by the chairman of the Commission in his dissenting opinion in Export Shipping Company cases, *infra*, p. 437, applies with even greater force here, and relieves me of the necessity of formally stating the reasons that compel me to dissent from the conclusions reached by the majority of the Commission in this proceeding. There is one question, however, that has had but little consideration in either proceeding, although of controlling importance in both, as it seems to me, and especially so here, and that is, How far may a carrier be compelled against its will to serve a competitor to the detriment of its own interests?

It is regarded ordinarily as a principle of common right that a person engaged in any kind of business may refuse his services and the use of his facilities to a competitor. And I see no reason why this rule of self-protection, concededly sound in all other forms of commercial activity and enterprise, should not be available to common carriers. It is said, however, in the majority opinion, that a forwarder is not a common carrier, and, therefore, is not a competitor of an express company, for example, when he gathers express matter from merchants and tenders it to the express company and demands its services in carrying the shipment to destination. This obviously is a strict, technical view of the status of a forwarder and of his relations to his patrons. It is true that he may not incur all the liabilities and subject himself to all the responsibilities that the law imposes upon common carriers, but a forwarder is, nevertheless, engaged in the business of transportation. Whatever may be the form under which the business is conducted, he makes his income out of trans-

portation. He steps in between the express company and its
105 patrons and collects express matter and delivers it at destination and fixes and receives a rate that will compensate him for his services. Although it is said that in doing this he is simply taking advantage of the rates which the express company offers to

the shipping public, yet in every practical and substantial sense he is himself the transporter of the merchandise so far as his patrons are concerned. If he is not a common carrier in the strict sense of that term, it is quite clear that he is not a shipper, except in a very loose sense. And to call him a shipper and accord him the rights of a shipper under the act to regulate commerce is to ignore the fact that he has nothing of his own to ship, but is simply selling transportation to those who have. He is a mere trafficker in freight rates, just as a ticket scalper is a trader in passenger fares.

But the special point to which I wish briefly to allude here is that in carrying on his business the forwarder comes into immediate and direct competition with the express company. By getting in between the express company and the shipper the forwarder is able to give the shipper a rate that has no lawful existence and is subject to no regulation or control, a rate which the express company could not lawfully accord to the shipper and the shipper could not lawfully accept from it. The shipper gets the same transportation, but at less than the lawful rate, on packages or small shipments, while the forwarder is compensated for his services by selling the transportation at more than the lawful rate for bulked shipments. In my judgment, this is nothing more or less than an absorption by the forwarder of the lawful revenues of the express company. And when an express company is required, as they are under the principles announced by the majority in this case, to carry for forwarders, they are in effect required to put their facilities at the service of, and to carry for, persons directly competing with them.

To give to forwarders the status and the rights of shippers is to make the business of forwarding a permanent feature in our commerce. This is to be regretted, not only because there seems to be no real general need of forwarders in this country, but because no advantage can come through them to the general public. Some shippers may in that way get lower rates than they now enjoy, but to the general shipping public the result cannot be other than disadvantageous. Anything that tends to increase the bulked shipments of express companies tends to diminish their revenues, and as a consequence to require a readjustment of their rates. As was well stated on the argument, it is not economically a sound proposition to interpose a new factor in transportation between the shipper and the carrier, a middle man who must make his living out of transportation. While the immediate result of this decision may be to enable the forwarder to carry on his business at the expense of the revenue of the carrier, the ultimate result will be to require the shipping public to support both the carrier and the forwarder.

I am requested by the chairman of the Commission to say that he concurs in this dissent.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y. Filed Oct. 15, 1908. John A. Shields, clerk.

107 In the Circuit Court of the United States for the Southern District of New York. October term, 1908.

DELAWARE, LACKAWANNA & WESTERN Railroad Company; Wabash Railroad Company; New York, Chicago & St. Louis Railroad Company, and Baltimore & Ohio Railroad Company, complainants,
v.

INTERSTATE COMMERCE COMMISSION, EXPORT Shipping Company, and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants.

In equity. No. 3-141.

The answer of the Interstate Commerce Commission.

The Interstate Commerce Commission, one of the defendants in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill of 108 complainant contained, for answer thereunto, or unto so much or such parts thereof as this defendant is advised is material for it to make answer unto, answers and says:

I.

Defendant admits the allegations contained in paragraph 1 of the bill

II.

Defendant admits the allegations contained in paragraph 2 of the bill.

III.

Answering paragraph 3 of the bill:

Defendant alleges that it has no personal knowledge of the matters covered by allegations contained in paragraph 3 of the bill, but believes such allegations are true and therefore admits same.

IV.

Answering paragraph 4 of the bill:

Defendant admits the allegations contained in the first subdivision of said paragraph 4.

Answering the second subdivision of said paragraph 4, defendant alleges that said Official Classification is not properly speaking a tariff, since it contains no rates of transportation but simply contains rules and regulations affecting rates of transportation named in the tariffs of complainants and other carriers who operate lines of railway in said Official Classification territory. Defendant admits

that complainants for several years last past have voluntarily
109 applied said rules to traffic transported by them over their lines of railway in said territory, but denies that otherwise complainants have been during said time or are now subject to and governed by the provisions, rules, and regulations of said Official Classification. Defendant admits that said Official Classification has been published and filed by complainants with defendant pursuant to said act to regulate commerce as amended, and that said Official Classification contains, among others, rules designated as Rule 5-B and Note, and Rule 15-E and Note as alleged by complainants in said paragraph 4, but denies that said official classification and said differences in rates between carload and less than carload shipments apply to and prevail with all common carriers by railroad within said territory. On the contrary, defendant alleges that said official classification, although prepared by a committee representing all the carriers operating lines of railway in said Official Classification territory, is applied to the transportation of traffic in said territory only to the extent that individual carriers see fit to and do so apply it, and that in many instances such individual carriers refuse to apply to said transportation the rules contained in said Official Classification and apply to such transportation instead other rules different from those contained in said Official Classification.

V.

Answering the first subdivision of paragraph 5 of the bill, defendant alleges that whether or not the Export Shipping Company, one of the defendants herein, is a forwarding agent or
110 whether or not it assembles or causes to be assembled at a given shipping point several less than carload shipments of freight owned by different persons, firms, or corporations to an amount sufficient to make a carload, or whether or not it receives goods at the point of destination and distributes them among several different parties, or whether or not its charges are a matter of private agreement and would vary as its interest and demands of competition might dictate, is immaterial in this case, because neither the name by which the carrier may see fit to designate a shipper, nor the services performed by the shipper in assembling articles of traffic before they are offered to the carrier for transportation, nor the ownership of such traffic when it is so offered, nor the distribution of the traffic made after its delivery by the carrier to the consignee at point of destination, nor whether or not the shipper is subject to the act to regulate commerce as amended, nor whether or not the shipper's charges for its

services are a matter of private agreement and vary as its interests and the demands of competition dictate, governs in any way or controls to any extent the right of a shipper to demand or the duty of a carrier to accord a rate of transportation on traffic offered by such shipper to such carrier for transportation from a point of origin in one State of the United States to a point of destination in another State of the United States and transported by said carrier from said point of origin to said point of destination

111 not greater than a rate of transportation published and filed by said carrier and contemporaneously applied to the transportation of a like kind of traffic offered to said carrier by another shipper for transportation, and contemporaneously transported by said carrier from said point of origin to said point of destination. Defendant admits that said Export Shipping Company orders cars from carriers which it loads or causes to be loaded with traffic, but denies that said traffic consists of less than carload shipments; admits that said Export Shipping Company takes out one bill of lading covering said traffic and showing that the traffic is shipped in the name of one consignor to one consignee, but disclaims information sufficient to form a belief as to whether or not said Export Shipping Company names as such consignor one of several owners of said traffic. In this connection, however, defendant alleges that there is nothing in the order of defendant, which order is the subject-matter of this suit, giving said Export Shipping Company the right to name in such case as consignor any party other than itself or giving to more than one consignee a right to demand from a carrier delivery of a carload shipment of traffic. Defendant admits that said Export Shipping Company when it offers a carload shipment of traffic to the railroad company for transportation seeks to have said railroad company apply to the transportation of said carload shipment the carload rate of the railroad company regardless of the ownership of

112 said traffic, but denies that such owners, if there were several owners of said traffic, would by such application of the carload

rate have their traffic carried at rates considerably less than the less than carload rates applicable thereto, or that in such a case said Export Shipping Company would receive as its compensation for securing a reduced rate for a less than carload shipper and for such incidental services as it might perform a proportion of the difference between the carload and the less than carload rate applicable to the shipment. In this connection defendant alleges that in such a case no less than carload rate would be applicable to such transportation, nor would any rate be so applicable except the carload rate. Defendant further alleges that complainants' use in said paragraph 5 of the term "less than carload shipment" is inaccurate, unfair, and misleading, and that shipments such as those referred to in said paragraph are properly called "carload shipments," and do not include different "less than carload" shipments.

Answering the second subdivision of paragraph 5 of the bill, defendant disclaims information sufficient to form a belief as to whether

or not with said rules 5-B and note and 15-E and note complainants have at all the times herein mentioned and for several years past required or do now require that when carloads of freight are made up of less than carload shipments of goods owned by two or more separate persons, firms, or corporations and intended to be delivered at the point of destination to two or more consignees the freight rates

for said shipments shall be the less than carload rates for the
113 several less than carload shipments contained in said carloads
of freight, or whether or not in such a case complainants charge
or collect from forwarding agents who combine less than carload
shipments of several owners into carloads, and ship the same as car-
loads the less than carload rates applicable to the several less than
carload shipments contained in said carloads, but defendant alleges
that complainants by the application to carload shipments of traffic
of said rules 5-B and note and 15-E and note where the traffic in each
car is not entirely owned by either the consignor or the consignee
thereof seek to compel the shippers of such traffic to pay for the
transportation thereof rates which are greater than complainants'
carload rates, namely, complainants' less than carload rates.

VI.

Answering the first subdivision of paragraph 6 of the bill, defendant admits that on or about April 23, 1907, the Export Shipping Company delivered to the Wabash Railroad Company in Chicago, Ill., 169 packages of merchandise consigned as a carload shipment, taking therefor a bill of lading showing that said merchandise was shipped by the Export Shipping Company and consigned to the Export Shipping Company, New York City, routed via the Delaware, Lackawanna & Western Railroad Company, but defendant denies that in making said shipment said Export Shipping Company acted as a forwarder agent. On the contrary, defendant alleges that said
114 Export Shipping Company acted in the premises as the shipper of said traffic.

Answering the second subdivision of paragraph 6 of the bill, defendant admits that on or about June 22, 1907, the Export Shipping Company delivered to the New York, Chicago & St. Louis Railroad Company at Chicago 108 packages of merchandise consigned as a carload shipment, taking therefor a bill of lading showing that said merchandise was shipped by E. Goldman & Co. and consigned to order of E. Goldman & Co., New York City, notify F. G. Bailey, routed via the Delaware, Lackawanna & Western Railroad Company, but denies that said Export Shipping Company acted in the premises as a forwarding agent, although defendant admits that said Export Shipping Company acted in the premises as agent of said E. Goldman & Co., the shippers of said traffic.

Answering the third subdivision of paragraph 6 of the bill, defendant admits that on or about May 9, 1907, the Export Shipping Company delivered to the Baltimore & Ohio Railroad Company in Chi-

cago 119 packages of merchandise consigned as a carload shipment, taking therefor a bill of lading showing that said merchandise was shipped by the Export Shipping Company and consigned to the Export Shipping Company, New York City, routed via the Baltimore & Ohio Railroad Company, but defendant denies that in making said shipment said Export Shipping Company acted as a forwarding agent. On the contrary, defendant alleges that said Export 115 Shipping Company acted in the premises as the shipper of said traffic.

Answering the fourth subdivision of paragraph 6 of the bill, defendant admits that each of the shipments above described was in fact a carload of mixed merchandise owned by different parties and that the packages included in each carload were assembled by said Export Shipping Company before said carload shipments were offered to the carrier for transportation, but defendant denies that any of said carload shipments consisted of several less than carload shipments of merchandise. Defendant admits that instead of applying to the transportation of said carload shipments their carload rates complainants exacted for such transportation rates which were much higher than their carload rates, namely, their less than carload rates.

VII.

Answering the first subdivision of paragraph 7 of the bill, defendant admits that on or about August 19, 1907, the Export Shipping Company filed three petitions with the Interstate Commerce Commission to recover alleged excess rate charges on the shipments mentioned in paragraph 6 of complainants' bill; that said alleged excess charges were the difference between the freight charges collected on the basis of complainants' less-than-carload rates and freight charges

which would have resulted from the application of complainants' carload rates to said shipments, but denies that the less-than-carload rates so collected should have been applied to the transportation of said shipments. On the contrary, defendant alleges that the rates which should have been applied to such transportation were and are complainants' carload rates. Defendant admits that one of said petitions was directed against the Wabash Railroad Company and the Delaware, Lackawanna & Western Railroad Company as defendants, and sets forth the shipment over the roads of those companies mentioned in paragraph 6 of complainants' bill, but denies that said shipment was as described by complainants in said paragraph 6. Defendant admits that the second of said petitions was directed against the New York, Chicago & St. Louis Railroad Company and the Delaware, Lackawanna & Western Railroad Company as defendants, and sets forth the shipment over the roads of those companies mentioned in said paragraph 6, but denies that said shipment was as described by complainants in said paragraph 6. Defendant admits that the third of said petitions was directed against the Baltimore & Ohio Railroad Company as defendant, and sets

forth the shipment over the road of that company mentioned in said paragraph 6, but denies that said shipment was as described by complainants in said paragraph 6. Defendant admits that said petition against the Wabash Railroad Company and the Delaware, Lackawanna & Western Railroad Company was similar to said other two petitions.

117 Defendant admits the allegations contained in the second subdivision of paragraph 7 of the bill.

Defendant admits the allegations contained in the third subdivision of paragraph 7 of the bill.

Defendant admits the allegations contained in the fourth subdivision of paragraph 7 of the bill, except that defendant denies that the issue at the hearings before defendant upon the petitions mentioned in paragraph 6 of the bill as stipulated was the legality of the note to Rule 5-B and of Rule 15-E and note of the said Official Classification. On the contrary, defendant alleges that said issue was the legality of the note to said Rule 5-B and the legality of said Rule 15-E.

VIII.

Defendant admits the allegations contained in paragraph 8 of the bill, except that defendant denies that the order of defendant mentioned in said paragraph 8 directs complainants to strike out and omit from their tariffs note to Rule 5-B and Rule 15-E and note. On the contrary, defendant alleges that said order directs complainants to strike out and omit from their tariffs said note to Rule 5-B and said Rule 15-E, but does not direct them to so strike out and omit note to Rule 15-E.

IX.

Answering paragraph 9 of the bill, defendant denies that for reasons stated in complainants' said bill, the enforcement of 118 said order of June 22, 1908, of the Interstate Commerce Commission should be permanently restrained by a decree of this court, or that pending hearing and determination of this suit a temporary injunction should be issued suspending said order and enjoining any proceedings thereunder.

X.

Answering the first subdivision of paragraph 10 of the bill, defendant denies that the main function of the forwarding agent is that of a mere freight scalper, to secure lower rates for less-than-carload shippers of freight than the less-than-carload rates applicable to their shipments in the carriers' tariffs; denies that the forwarding agent confers no other substantial benefit upon less-than-carload shippers; and denies that carload shippers throughout the country have no rights or interests to be protected and preserved by the continued existence of the forwarding agent other than as they secure

the advantage of rates lower than the carrier's published rates on less-than-carload shipments.

Answering the second subdivision of paragraph 10 of the bill, defendant denies that the conditions and circumstances incident to and attending the transportation of a carload of freight of one owner are substantially different than when a carload of freight is tendered to complainants by a forwarding agent who has combined into said carload several less-than-carload shipments of different owners.

Answering the third subdivision of paragraph 10 of the bill,
119 defendant denies that a forwarding agent's business is that
of transportation; denies that a forwarding agent makes its
profits out of a transportation charge; admits that a forwarding
agent collects freight at a point of shipment and delivers it at a
point of destination; denies that a forwarding agent uses the facilities
of a railroad carrier to transport freight between a point of origin
and a point of destination; denies that a forwarding agent performs
services of, or that it is in the nature of its business and its relations
to its customers and to the railroads, a common carrier, but admits
that in making shipments over different railroads it sometimes acts
as agent for other parties. Defendant denies that as such shipper
the forwarding agent is not a person within the meaning of the
word as used in the act to regulate commerce, and denies that as such
shipper the forwarding agent is not entitled to transportation services
from complainants on the same terms as persons within the purview
of said act.

Answering the fourth subdivision of paragraph 10 of the bill, defendant denies that the forwarding agent seeks to pay the complainants for the use of their facilities in carrying out contract of transportation with individual shippers a less sum than complainants themselves charge said shippers, and denies that the forwarding agent offers to such shippers lower rates than complainants do. Defendant denies that the forwarding agent seeks by the methods of a freight scalper to take from complainants a part of their legitimate

business which would come to them in the absence of the forwarder,
120 and denies that the forwarding agent is in fact a competitor of complainants in the matter of transportation, and denies that as such competitor the forwarding agent is hostile to the interests and revenues of complainants.

Answering the fifth subdivision of paragraph 10 of the bill, defendant admits that complainants have equipped themselves with facilities for consolidating the less than carload shipments of various shippers into carloads and for receiving, loading, and delivering such less than carload shipments, but denies that the forwarding agent seeks to perform for less than carload shippers the said services incidental to transportation that complainants are prepared and desire to perform, and denies that the forwarding agent diverts from complainants' profits which accrue from the performance of such incidental services. In this connection defendant alleges that the forwarding agent does not perform services incidental to transporta-

tion for less than carload shippers in making carload shipments of traffic and performing services incidental thereto.

Answering the sixth subdivision of paragraph 10 of the bill, defendant admits that said Official Classification permits the consolidation into a carload by the owner of two or more articles having the same carload rating, and also of articles having different carload ratings and the application thereto of a carload rate. Defendant disclaims information sufficient to form a belief as to whether or not

5,852 less than carload or 4,235 carload ratings are contained
121 in said Official Classification, or whether or not 72 per cent of the articles named in said Official Classification can be combined into carloads and take a carload rating, or whether or not in said Official Classification territory fully half of the westbound and a large proportion of the eastbound freight consists of less than carload shipments, or whether or not the field for the operation of forwarding agents is large, and alleges that complainants' allegations that if complainants are required to accept carload shipments of forwarding agents at the carload rating given to carload shipments of a single ownership, the business of forwarding agent, requiring small capital and yielding easy and certain profits, will become general and the less than carload business of complainants will be substantially reduced, and that a large part of the freight now handled at the less than carload rate will then be handled at a carload rate, and that a large reduction of complainants' revenue will result, are, and that each of said allegations is, based upon mere speculation, and that therefore none of said allegations can be definitely answered by defendant. Defendant further alleges that each and every allegation contained in said subdivision 6 is impertinent, irrelevant, and immaterial.

Answering the seventh subdivision of paragraph 10 of the bill, defendant admits that complainants as common carriers provide equipment and facilities for the handling and transportation of less than carload freight, including terminals in large cities, freight

houses and yards, transfer platforms, loading and unloading
122 equipment, clerical force and equipment, station agencies, and the like, but alleges that complainants' allegations that if forwarding agents be allowed to operate extensively complainants will still continue to have a considerable amount of less than carload business to handle, for which their less than carload plants will have to be maintained in substantially their present conditions; that their freight houses can not be diminished nor their fixed charges lowered nor the number of trains for less than carload shipments reduced; that the clerical and laboring forces can not be reduced in proportion to the falling off of the less than carload traffic which would result; that practically the same less than carload expense will have to be charged against the decreased less than carload revenues; that the revenues of complainants will be materially reduced; that to maintain their present net revenues complainants will be compelled to increase their less than carload or carload rates, or both, or allow the services

to deteriorate; that the general operation of forwarding agents would affect the business interests of complainants to their serious detriment by depriving them of an important source of revenue and by reducing the value of their less than carload plants in so far as such plants would become useless by reason of the falling off in less than carload business, are, and that each of said allegations is, based upon mere speculation, and that therefore none of said allegations can be definitely answered by defendant. Defendant further alleges that each
123 and every allegation contained in said subdivision 7 is impertinent, irrelevant, and immaterial.

Answering the eighth subdivision of paragraph 10 of the bill, defendant alleges that complainants' allegations that the operation of forwarding agents would result in widespread discrimination among less than carload shippers in the matter of both rates and services; that this result inheres in the business of the forwarding agent and would become more serious as the business of the forwarding agent became more general; that the forwarding agent as compensation for its services in securing for a less than carload shipper a lower rate than the less than carload rate would divide with the shipper the difference between the less than carload and the carload rate; that it might charge one less than carload shipper a given price for its services and another a different price; that it might serve one shipper for a nominal sum; that it might refuse to serve another shipper; that the range of its charges would be limited only by the difference between the less than carload and the carload rates on a given commodity; that discrimination would necessarily follow the operation of the forwarding agent, and that discrimination between the shipper who must use the less than carload rate and those fortunate enough to ship through the forwarding agent would result; that among the many shippers who would ship through the forwarding
agent the freight rates such shippers would actually pay would
124 vary with the charge of the forwarding agent, and that there would be a discrimination in the services which the forwarding agent might afford to large and favored shippers and deny to small and less important shippers, are, and that each of said allegations is, based upon mere speculation, and that therefore none of said allegations can be definitely answered by defendant. Defendant further alleges that each and every allegation contained in said subdivision 8 is impertinent, irrelevant, and immaterial.

Answering the ninth subdivision of paragraph 10 of the bill, defendant alleges that complainants' allegations that the forwarding agent could operate successfully only in places from which the number of less than carload shipments was large enough to make its business profitable, and that less than carload shippers in small towns would be unable to secure its services and would be put to a disadvantage as against their competitors in large places, are, and that each of said allegations is, based upon mere speculation, and that therefore neither of said allegations can be definitely answered by defendant.

Defendant further alleges that each of said allegations is impertinent, irrelevant, and immaterial.

Answering the tenth subdivision of paragraph 10 of the bill, defendant alleges that complainants' allegation that the freight rate which less than carload shippers shipping through forwarding agents actually would pay would be secret, unstable, and variable, is based upon mere speculation, and that therefore defendant can not 125 answer said allegation definitely. Defendant further alleges that said allegation is impertinent, irrelevant, and immaterial.

Answering the eleventh subdivision of paragraph 10 of the bill, defendant alleges that complainants' allegations that the operation of the forwarding agent would mean the intervention of another middleman between the producer and consumer, a new factor that must make its profits out of the transportation service; that the ultimate result would be an increase in the cost of articles to the consumer without increasing their value; and that all these results of the operation of the forwarding agent would affect the business and revenues of complainants, are, and that each of said allegations is, based upon mere speculation, and that therefore none of said allegations can be definitely answered by defendant. Defendant further alleges that each and every allegation contained in said subdivision 11 is impertinent, irrelevant, and immaterial.

Answering the twelfth subdivision of paragraph 10 of the bill, defendant alleges that it is uninformed concerning the results complainants seek to prevent by the enforcement of said rules 5-B and note, and 15-E and note, but that one result actually accomplished by complainants through the enforcement by them of said note to Rule 5-B and said Rule 15-E is an unjust discrimination between different shippers in violation of section 2 of the act to regulate commerce.

Answering the thirteenth subdivision of paragraph 10 of the 126 bill, defendant admits that in portions of the United States outside of Official Classification territory the rules of the carriers permit the mixing and consolidation of certain commodities for the several owners thereof by forwarding agents at carload rates, but denies that in such portions of the United States the rules of the carriers forbid the general mixing of commodities. Defendant admits, however, that such general mixing can not be indulged in by shippers, but alleges the reason for this to be that said carriers have not made rules permitting such general mixing. Defendant denies that greater delay in the loading of cars of forwarding agents than the cars shipped by one owner has resulted or would result from permitting forwarding agents to ship at carload rates such commodities as may be mixed while not permitting the general mixing of commodities. Defendant disclaims information sufficient to form a belief as to whether or not as a general rule no demurrage accrues at the point of loading of carload shipments of one ownership, but denies that for delay to their equipment complainants would not be fully compensated by their demurrage charges. Defendant disclaims information sufficient to form a belief as to whether or not the tendency to delay

in loading is inherent in the business of the forwarding agent and has manifested itself in the various shipments of the Export Shipping Company hereinbefore mentioned or whether or not this results from a division of the responsibility in the matter of loading among the

several actual owners of the freight, the carting of the freight
127 by the different draymen of the several owners, the withdrawal
of shipments at the last minute by the owners thereof or the
interest the forwarding agent has in holding the car until it is filled
to its capacity, but alleges that in this regard the delay to cars loaded
by forwarding agents is not greater than the delay to cars loaded by
other shippers, and defendant further alleges that the demurrage
charged by complainants to forwarding agents and other shippers
for the use of their cars while being loaded is four times as great as
the charge made by one carrier against another for the use of the car.

Answering the fourteenth subdivision of paragraph 10 of the bill, defendant denies that in case of carload shipments by forwarding agents as compared with carload shipments of a single ownership, false billing and false classification are or would be more prevalent on account of greater opportunity and temptation therefor which would result, and alleges that no such greater opportunity or temptation would result. Defendant alleges that complainants' allegations that carload shipments by forwarding agents would often be made up of many different classes of freight and that carload shipments of a single ownership usually consist of a single class of freight are, and that each of said allegations is, impertinent, irrelevant, and immaterial, for the reason that there is no issue in this case between carload shipments of forwarding agents made up of different classes of freight on the one hand and carload shipments of single ownership con-

sisting of a single class of freight on the other hand. Defendant
128 denies that high-class freight is easily concealed in consolidated
carloads, but alleges that defendant does not know whether or
not complainants would willingly accept high-class freight without
limiting specially their liability. Defendant alleges that the allega-
tions of complainants that since the profit of the forwarding agent and
the saving to the actual shippers depend upon the lowness of the car-
load rating secured and that since, when freight of different classes
is mixed, the carload rating and minimum weight for the highest
class applies to the whole carload, the temptation to false classifica-
tion is and would be materially increased by permitting the forward-
ing agent to conduct its business as desired, are, and that each of
said allegations is, impertinent, irrelevant, and immaterial, because
the temptation is and would be no greater where the forwarding
agent was the shipper than where the party owning all the goods in
the carload was the shipper, since from such false classification such
owner would derive for his individual benefit as low rates of trans-
portation and as much profit as it would be possible for a forwarding
agent or any other party to obtain.

Answering the fifteenth subdivision of paragraph 10 of the bill, defendant denies that carloads of forwarding agents would contain

shipments of heavy articles together with those of light and breakable ones to a greater extent than carload shipments of a single ownership and thus be more susceptible to damage. Defendant denies that in case of loss, damage, or delay to such shipments complainants could not adjust claims and obtain valid releases from the forwarding agent; denies that complainants would be necessarily subject to actions in tort by the several actual owners of the goods as well as to an action on contract by the forwarding agent; denies that necessarily such actions might be brought in widely separated localities, and denies that it would be necessary for complainants to incur the expense of more than one case or procure a judgment against one owner which would not be a bar to suits by other owners, where only one carload of traffic shipped by one consignor to one consignee, neither such consignor nor such consignee being the owner of all said traffic, was transported by complainants. In this connection defendant alleges that the greater liability of loss to complainants on carload shipments of diverse ownership as compared with carload shipments of a single ownership pictured by complainants in said subdivision 15 is not real, but is almost entirely imaginary, and may be wholly eliminated by complainants under existing laws and such regulations as complainants may lawfully make covering shipments made by shippers who do not own the goods shipped.

Answering the sixteenth subdivision of paragraph 10 of the bill, defendant alleges that complainants' allegations that complainants would be subject to greater liabilities in the case of carload shipments of a forwarding agent than of a single owner, because the freight of any one of the several owners might be seized by legal process, or the real owner might at any time reclaim the goods from the possession of the carrier irrespective of who is the consignor, or the real owners might severally exercise the right of stoppage in transit and complainants' responsibilities be thereby increased and complicated both to the owners of goods directly affected and to owners of other goods in the same car thereby delayed in transportation, are and that each of them is comparatively unimportant as shown by defendant in its answer to allegations contained in subdivision 15 of said paragraph 10.

XI.

Answering the first subdivision of paragraph 11 of the bill, defendant admits that section 2 of the act to regulate commerce as amended reads as alleged by complainants in said subdivision 1.

Answering the second subdivision of paragraph 11 of the bill, defendant denies that carload shipments of forwarding agents are made up of several less than carload shipments of various owners, and denies that the circumstances and conditions under which said carload shipments are transported by complainants are substantially dissimilar from the circumstances and conditions under which carload shipments of a single ownership are transported by complainants.

Answering subdivisions A, B, C, D, E, F, G, H, I, and J of paragraph 11 of the bill, defendant alleges that said subdivisions are in substance a repetition of allegations contained in paragraph 10 of complainants' bill, and therefore refers the court to defendant's answers to said allegations hereinbefore set forth and prays that same may be taken and regarded as its answers to said subdivisions A to J, inclusive.

131 Answering the thirteenth subdivision of paragraph 11 of the bill, the same being the fifth paragraph on page 20 of the bill, defendant denies that the carload of freight mentioned in said paragraph consists of less than carload shipments of several owners, although it consists of various articles owned by different parties, and defendant denies that complainants have the right to charge a higher freight rate for transporting said carload of freight when delivered to complainants by a shipper called by complainants "a forwarding agent" than complainants exact for transporting a carload of a single ownership where the owner of the freight is the shipper.

Answering the fourteenth subdivision of paragraph 11 of the bill, defendant denies that where a carload shipment is made by a forwarding agent the actual shippers are the owners of the less than carload shipments contained in said carload, first, because there are no less than carload shipments in said carload, and, second, because the shipper is either said forwarding agent or some one consignor or consignee for whom in making said shipment said forwarding agent acts as agent, and defendant therefore denies that in applying their less than carload rates to the transportation of said carload shipments complainants do not in any way discriminate.

132 Answering the fifteenth subdivision of paragraph 11 of the bill, defendant denies that the application of the less than carload rate to carload shipments of forwarding agents and of the carload rate to carload shipments of a single ownership is not a discrimination within the meaning of section 2 of said act to regulate commerce as amended.

Answering the sixteenth subdivision of paragraph 11 of the bill, defendant denies that the application of a higher rate to the carload shipments of forwarding agents than to the carload shipments of a single ownership is lawful, reasonable, just, or not unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of said act to regulate commerce as amended. On the contrary defendant alleges that such discrimination in the application of rates of transportation is unlawful, unreasonable, unjust, unjustly discriminatory, unduly preferential and unduly prejudicial in violation of said act.

Answering the seventeenth subdivision of paragraph 11 of the bill, defendant admits that the Interstate Commerce Commission is constituted and organized and exists under various acts to regulate commerce and that so far as the order which is the subject-matter of this suit is concerned defendant has no power or authority other than that given to and conferred upon it by said acts.

Answering the eighteenth subdivision of paragraph 11 of the bill, defendant denies that said order of June 22, 1908, is illegal or void, or that defendant had no power, jurisdiction, or authority of law to make same. On the contrary defendant alleges that defendant had full power, jurisdiction, and authority to make said order, and that the same is legal and valid.

XII.

Answering paragraph 12 of the bill:

Defendant denies that said forwarding agent is an independent shipping agency, although defendant admits that said forwarding agent in many instances acts as agent for carload shippers of interstate traffic. Defendant denies that in the nature of its business said forwarding agent is a common carrier or that said forwarding agent is not a person within the definition of the word as used in said acts to regulate commerce, or that said forwarding agent can not legally require complainants to perform transportation services for it when acting as shipper of said carload shipments, or that the Interstate Commerce Commission was or is without power, jurisdiction, or authority of law to compel complainants to refrain from unjust discrimination between carload shippers, including forwarding agents, who are not the owners of the traffic shipped on the one hand and shippers who are the owners of such traffic on the other hand, and defendant denies that said order of June 22, 1908, is illegal or void. On the contrary defendant alleges that said order is legal and valid.

134

XIII.

Answering paragraph 13 of the bill:

Defendant denies that forwarding agents are competitors of complainants in the matter of transportation, and alleges that complainants' allegations that the general operation of forwarding agents would materially reduce complainants' revenues is based upon mere speculation, and therefore can not be definitely answered by defendant, and that said allegation is impertinent, irrelevant, and immaterial. Defendant admits that complainants have a right to make reasonable regulations in connection with the performance by them of their duties as common carriers, but denies that in order to protect their business and secure a reasonable profit therefrom complainants have the right to so fix terms upon which they will accept for transportation consolidated carloads as to produce an undue discrimination between shippers, including forwarding agents who do not own the traffic shipped on the one hand and shippers who are the owners of the traffic shipped on the other hand. Defendant denies that said order of June 22, 1908, deprives complainants of their legal right in connection with the fixing of said terms and consequently reduces their net revenue and depreciates their property,

or that said order is illegal or void in that it takes complainants' property without due process of law contrary to the Constitution of the United States.

135 XIV.

Answering paragraph 14 of the bill:

Defendant denies that said interstate commerce act as amended was intended primarily to preserve equality among shippers, except that defendant admits and alleges that said law was enacted for the purpose of compelling common carriers to refrain from unjust discrimination between different shippers. Defendant denies that said act was intended to secure the publicity and stability of all charges for the service of transportation and all services incidental thereto or connected therewith, except that defendant admits and alleges that said act was intended to secure the publicity and stability of all charges exacted by common carriers for the transportation by them of inter-state traffic and services performed by such carriers in connection with such transportation. Defendant denies that the business of the forwarding agent results in widespread discrimination among less than carload shippers or renders the transportation charges flexible instead of stable or dependent upon the will and caprice of the forwarding agent or makes it impossible for any less than carload shipper to know the rates at which his less than carload competitors are shipping or nullifies the provisions of the second, third, and sixth sections of said act to regulate commerce as amended, or any of them. Defendant denies that if the said order of defendant be enforced against complainants the purpose of said act to regulate commerce as amended will be subverted or that the evils that said act was designed to prevent will be restored, and defendant denies that said order requires complainants to permit, sanction, or engage in a practice which violates said second, third, and sixth sections of the said act to regulate commerce as amended, or any of them, and defendant denies that said order is illegal or void.

XV.

Answering the first subdivision of paragraph 15 of the bill, defendant admits that the portion of section 10 of said act to regulate commerce, as amended, quoted by complainants, reads as alleged by complainants in said subdivision 1.

Answering the second subdivision of paragraph 15 of the bill, defendant admits that the portion of section 6 of said act quoted by complainants reads as alleged by complainants in said subdivision 2.

Answering the third subdivision of paragraph 15 of the bill, defendant admits that section 1 of the "act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, as amended June 29, 1906, and known as the Elkins Act, provides as alleged by complainants in said subdivision 3.

Answering the fourth subdivision of paragraph 15 of the bill, defendant denies that a forwarding agent collects and consolidates into a carload the less than carload shipments of several owners and tenders such carload of freight to complainants as a carload 137 shipment, but admits that a forwarding agent assembles a carload of articles owned by different parties, and after loading such articles into one car tenders such carload of freight to complainants as a carload shipment, and defendant denies that the real shippers of the freight contained in the carload so tendered are the several owners thereof or that each of said owners is in fact a less than carload shipper. Defendant admits that the only legal rate applicable to a less than carload shipper is the less than carload rate published and filed by complainants with the Interstate Commerce Commission. Defendant denies that a less than carload shipper, by shipping his goods in combination with the less than carload shipments of various other shippers through the instrumentality of a forwarding agent, seeks to secure the transportation of his goods at a lower rate than the legal rate applicable thereto.

Answering the fifth subdivision of paragraph 15 of the bill, defendant denies that the forwarding agent is a device or instrumentality whereby less than carload shippers seek to accomplish a purpose in violation of said sections 6 and 10 of the act to regulate commerce and section 1 of the Elkins Act, or in violation of any of said sections. Defendant denies that said order of defendant attempts to legalize a practice that violates the said provisions of the acts to regulate commerce or requires complainants to participate in or be parties to an illegal practice, or that said order is illegal, or that defendant had no power, jurisdiction, or authority of law to make 138 the same. On the contrary, defendant alleges that said order is legal and valid and that defendant had full power, jurisdiction, and authority to make said order.

Defendant further alleges that said order of June 22, 1908, is based upon facts, circumstances, and conditions which are as follows:

For the purpose of classifying their traffic, carriers divide the United States into three classification territories, namely, the Southern, which includes practically all points east of the Mississippi River and south of the Ohio and Potomac rivers; the Western, which embraces that part of the country west of the Mississippi River and Great Lakes and an imaginary line extending from St. Louis to Chicago; and the Official, which covers the remaining portion.

In each territory the work of classifying traffic and formulating rules and regulations pertaining to the transportation thereof is done by a committee representing all or practically all the carriers who operate lines of railway in that territory, but no carrier is legally obliged to accept the conclusions of the committee, and while, generally speaking, such conclusions are accepted by the carriers and enforced by them in connection with the transportation of traffic over their lines of railway, in many instances individual carriers file with defendant both the classification made by the committee and the

carriers' exceptions thereto, the latter being accompanied by rules and regulations of the carrier relating to certain traffic which are different from those relating to the same traffic contained in the classification made by the committee.

139 There is no rule of law requiring the carriers to transport a given tonnage at a rate per 100 pounds which is less than the rate contemporaneously exacted for the transportation of a less tonnage even where the transportation in each instance is over the same line in the same direction and between the same points, but they voluntarily make, publish, and file classifications and tariffs wherein and whereby they accord to transportation of traffic shipped in carload lots lower rates per 100 pounds than they accord to the same kind of traffic shipped in less than carload lots, and they are able to and do justify this discrimination by showing that the cost to them of the transportation services performed by them is much less in the former case than in the latter.

Neither is there any rule of law which requires the carriers to allow shippers to combine in one carload and ship at a carload rate articles of different kinds classified and rated alike or articles of different kinds classified and rated differently, but they voluntarily make, publish, and file rules and regulations which are generally, but not always, included in the classifications made by said committees, whereby such combinations are permitted.

Both the number of carload rates so established and applied and the number of combinations so permitted are much greater in the Official than in either of the other two territories named, but while in the Western and Southern territories the right to make 140 such combinations and use said carload rates is, regardless of the ownership of the traffic shipped, accorded to all shippers, including forwarding agents, carriers operating in the Official territory undertake by the application of the rule and note which are the subject-matter of said order of June 22, 1908, to confine the right to make such combinations and use said carload rates to cases where either the consignor or the consignee is the owner of all the traffic in the car. However, in all the territories the application of the carload rate is confined to cases where the traffic is shipped in the name of only one party, who acts as shipper, and all consigned to one consignee at one destination.

The rules under which carriers operating in the Official territory undertake to make the discrimination above named are shown in defendant's report and order of June 22, 1908, and the rules of the Southern and Western territories, according to shippers the right to make combinations and use carload rates as aforesaid, are as follows:

" SOUTHERN CLASSIFICATION No. 35.

" Effective May 1, 1908.

" RULE 24. (a) Carload rates shall apply only when a carload of freight is shipped from one station, in one day, by one shipper, to one consignee and destination. Only one bill of lading shall be

issued for any such carload shipment. The minimum carload weight provided for on any article has reference to the minimum weight on which the carload rate will apply, when loaded in or upon one car (subject to Rule 24-C), although the actual weight may be less.

"(b) Agents at destination must not distribute carload shipments of freight to two or more consignees. Agents at border points or at points within the territory covered by this classification must not act as forwarding or distributing agents for shippers or owners.

"(c) Unless otherwise specified in the classification, the minimum carload weight of all articles shall be 24,000 pounds; or 12 tons, where the rate applies per net or gross ton.

"**RULE 25.** (b) When no carload rate is specified for an article, the L. C. L. rate shall be charged for any quantity of the article; and no two or more articles, each of which has a carload rate, shall be shipped in mixed carloads at the carload rate, unless so provided for in the classification.

"WESTERN CLASSIFICATION No. 45.

"Effective November 1, 1908.

"**RULE 6-A.** Carload freight will be rated and charged according to the current rules governing maximum and minimum weights of carloads as authorized by the companies adopting this classification, except that the weights and charges on shipments in tank cars shall be based on the full gallonage capacity of tank. Provisions for carload ratings shown in the classification will apply only upon shipments received on one day from one consignor, under one bill of lading, and delivered under one expense bill to one consignee.

142 Carload rates are not applicable on freight consigned to railroad agents.

"**RULE 21-A.** Unless otherwise specified in the classification, where two or more articles are mentioned in one item or bracketed items, they may be forwarded in straight or mixed carloads at the rate shown, except as provided in paragraph B of this rule.

"B. Carload ratings shown in the classification for articles 'subject to Rule 21-B' will not apply on straight carloads of the articles named. In such cases the amount of the article so designated, which may be included, shall not exceed 33½ per cent of the minimum weight provided for the mixed carload."

Evidence received from time to time by defendant from carriers indicates that the less than carload rates applied by the carriers are on an average about 150 per cent of the carload rates applied by them where the transportation is over the same line, in the same direction, and between the same points, but in this regard there is no fixed rule and much variation exists.

Previous to December 2, 1903, carriers operating in the Official territory undertook to confine the right to make combinations and use carload rates as aforesaid to cases where the consignor was the owner

of all the traffic in the car, but as the result of an order made by defendant in the case of The Buckeye Buggy Company v. The Cleveland, Cincinnati, Chicago & St. Louis Railway Company et al. (9 I. C. C. Rep., 620), such right has been for several years and

143 is now accorded also in cases where the consignee is the owner of all the traffic in the car.

A copy of defendant's report in said Buckeye Buggy Company case, marked "Exhibit A," is hereto attached and made a part of this answer.

Previous to April 8, 1907, carriers operating lines of railway in different parts of the United States and who had established and put in force rates for the interstate transportation of passengers which were less in each instance for each passenger carried where several traveled together than the rates contemporaneously exacted by them for the transportation of a single passenger between the same points undertook to confine the application of such lower rates to certain companies or classes of individuals, but as a result of defendant's decision in the case of In the Matter of Party Rate Tickets (12 I. C. C. Rep., 95), such carriers discontinued said discrimination.

A copy of said decision, marked "Exhibit B," is hereto attached and made a part of this answer.

Section 2 of the act to regulate commerce was enacted to prevent in this country the same discriminations which are prohibited in England by section 90 of the railways clauses consolidation act, known as and called the "equality clause." The language of the latter, so far as material here, is as follows:

"Provided. That all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances: and no reduction or advance in any such tolls shall be either directly or indirectly in favor or against any particular company or person traveling upon or using the railway."

For several years after said equality clause was enacted there was much conflict concerning its construction in the decisions of the different English courts, but after an exhaustive review of former cases an authoritative conclusion was finally announced in the case of Great Western R. Co. v. Sutton. (L. R. 4 H. L., 226.) The conclusion reached was that, as used in the English act, the words "same description" or "like description" exhaust themselves upon the traffic, and the words "like circumstances" exhaust themselves upon the route, expense, and risk of carriage, and that neither can be extended to the personal qualities of the party who makes the shipment.

The Sutton case was followed by the Supreme Court of the United States in Interstate Commerce Commission v. Baltimore & Ohio Rail-

road Company (145 U. S., 263), and in speaking in the latter case of the English acts regulating transportation the Supreme Court said:

"These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long-and-short haul clause of the act, or would be open to 145 the charge of unjust discrimination. But so far as relates to the question of undue preference it may be presumed that Congress in adopting the language of the English act had in mind the constructions given to these words by the English courts and intended to incorporate them into the statutes." (Ib., 284.)

The Supreme Court also said that—

"If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage." (Ib., 281.)

In the case of Wight v. United States (167 U. S., 512) the Supreme Court, in construing section 2 of the act to regulate commerce, said:

"* * * It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

"It may be that the phrase 'under substantially similar circumstances and conditions,' found in section 4 of the act, and where the matter of the long-and-short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2.

It will be time enough to determine that question when it is 146 presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition." (Ib., 518.)

The ruling in the Wight case was referred to and reaffirmed in the case of Interstate Commerce Commission v. Alabama Midland Railway Company (168 U. S., 144, 166-167). In the latter case the Supreme Court held that when passing upon the lawfulness of discriminations alleged to be in violation of sections 3 and 4 of said act competition which affected rates should be considered, and it distinguished this ruling from the ruling in the Wight case as follows:

"To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

"As we have shown in the recent case of *Wight v. United States* (167 U. S., 512), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit 147 any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

"This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act: for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of inter-state and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

"In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition 148 from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration."

By section 2 of the act to regulate commerce carriers are prohibited from exacting from one person a greater compensation than they exact from another person for services rendered or to be rendered by the carriers in the transportation of passengers or property where the services are like and contemporaneous, pertain to a like kind of traffic, and are performed by the carriers under substantially similar circumstances and conditions. Complainants admit the services are like and contemporaneous—that is to say, they admit that the traffic is of the same character and contemporaneously transported by them from the same point of origin, over the same line, in the same direction, to the same point of destination—but they deny that the transportation services are performed by them in each instance under substantially similar circumstances and conditions. They also contend that the word "person," as used in section 2, does not include a forwarding agent, but the language of the Supreme Court in the *Wight* case above quoted shows that this position is untenable and 149 that the word "person," as used in said section 2, includes every party who acts as shipper of traffic.

One of the complainants' principal reasons for claiming that said order of June 22, 1908, is unlawful is that if obedience to said order is enforced discriminations between parties who have less than carload lots of traffic to ship will result, because through the forwarding agent, acting as shipper, one of such parties will obtain one rate while another is compelled to pay another and higher rate, but if the complainants really desire to prevent such discriminations they can easily do so, notwithstanding the terms of said order, by canceling their aforesaid rules and regulations permitting combinations and the use of carload rates. By so doing they would place all shippers upon a parity and render it impossible for a forwarding agent or any other shipper to bring about an inequality so far as rates of transportation are concerned; but while such action would do away with the discriminations to which complainants object, it would also make it impossible for complainants to control to the extent they do now the business of the country outside of transportation. Under their present rules and regulations permitting combinations and the use of carload rates where the traffic is all owned by either the consignor or the consignee, but denying the said privileges where such ownership does not exist, they are able to a large extent to dictate concerning the parties who shall engage in business and the places where the business shall be done. During the time
150 the carriers confined the privilege of making combinations and using carload rates to cases where the consignor was the owner of all the traffic in the car, consignees, in order to obtain the carload rate, were compelled to purchase from one party at a delivered price all the traffic or visit the shipping point and personally tender to the carrier for transportation the carload shipment. This was a great advantage to the party of large capital who was able to and did engage in the manufacture and sale of many different articles, but was a corresponding disadvantage to the party of small capital who manufactured or sold only one article. It also operated to the advantage of large towns, but was correspondingly harmful to small towns; and complainants' present practice of confining to owners of the traffic the right to combine in one car and ship at a carload rate different articles classified and rated alike and different articles classified and rated differently has a like effect—that is to say, the very discriminations complainants claim will ensue if obedience to said order of June 22, 1908, is enforced, do now exist, and will be certain to continue if complainants do not comply with the terms of said order.

Investigations made by defendant from time to time during recent years show that a very large portion of the interstate traffic transported by common carriers in this country is shipped by parties who do not own any of the traffic. A large proportion of the shipping
151 is done by voluntary associations and corporations, who, as agents of the owners, act as coconsignors and consignees of fruit grown in California and Florida, and other kinds of traffic. In many cases, also, one of several owners, as agent of all the owners assembles the traffic at the point of origin, and in shipping the traffic

in carload lots at carload rates acts as the consignor or consignee, or both. In this manner farmers ship their vegetables and other products to market, and ship in the opposite direction carloads of phosphate, etc., which they are obliged to use on their farms. Denying them the right to make such combinations and such use of carload rates, while granting that right where the shipper is the owner of all the goods in the car, would facilitate monopoly and to a large extent render parties of small capital subject to the will of parties possessed of large capital and enable large concerns, such as those operating department stores, to ruin the business of their smaller competitors.

To make ownership the test of the right to make carload shipments at carload rates is impracticable, and if an attempt to do so were made much harmful discrimination would inevitably result because of differences in the requirements of different carriers and different agents of the same carrier concerning proof of ownership.

The expense to the carrier is the same, regardless of ownership; that is to say, aside from the risk, the cost to the carrier of the transportation services performed is no greater where the shipper is not

the actual owner of the traffic than it would be otherwise, and

152 as between the two cases the difference in risk is insignificant. In this connection defendant alleges that during the fiscal years ending June 30, 1903, 1904, 1905, 1906, and 1907, according to reports made under oath by complainants to defendant, the total loss and damage accounts of complainants were the percentages of their total freight earnings shown in the following table, namely:

Name of road.	Year ending June 30—	Ratio of loss and damage to total freight earnings.	<i>Per cent.</i>
Delaware, Lackawanna and Western R. R. Co.	1907	0.613	
	1906	.595	
	1905	.458	
	1904	.453	
	1903	.489	
Wabash Railroad Co.	1907	2.165	
	1906	1.783	
	1905	2.020	
	1904	1.239	
	1903	.937	
New York, Chicago and St. Louis R. R. Co.	1907	1.571	
	1906	.935	
	1905	.981	
	1904	1.046	
	1903	.688	
Baltimore and Ohio R. R. Co.	1907	1.178	
	1906	1.043	
	1905	1.362	
	1904	1.260	
	1903	.998	

Defendant further alleges that said percentages cover the following items: Charges for loss, damage, delays, or destruction of freight, parcels, express matter, baggage, and other property intrusted for transportation (including live stock received for shipment), and all expenses directly incident thereto; cost of repacking and boxing damaged freight and baggage, feed for delayed stock (except when delayed in wrecks), etc.; wages and expenses of employees engaged either as adjusters or otherwise, and payments for the detection of thieves; charges for damages to or destruction of crops, buildings, lands, fences, vehicles, or any property other than that intrusted for transportation, whether occasioned by fire, collision, overflow, or otherwise; also expenditures for account of cattle and other live stock killed or injured by locomotives or trains while crossing or trespassing on the right of way, removing and burying the same; also services and expenses of employees or others while engaged as witnesses in case of suits.

If the items not properly chargeable to the transportation of freight articles were excluded, said loss and damage accounts would be thereby very much reduced, and where the percentage which includes the total loss and damage account is small, the differences in risk between the different kinds of shipments above mentioned would be practically unnoticeable.

Defendant believes and thereupon alleges that complainants' alleged fear of loss as between the different shipments above mentioned arising from seizure of goods by legal process, reclamation of goods by their real owner and stoppage in transit, is almost wholly, if not quite, imaginary. In this connection defendant alleges that only one instance of a suit arising from such matters has been called to the attention of defendant either in this case or in any other case, although the rules which are the subject-matter of said order of June 22, 1908, have been complained of at different times during several years last past.

The decisions above referred to show that in passing upon the question of whether or not the different shipments are transported by complainants under substantially similar circumstances and conditions it is not proper to consider what happens before the traffic is offered to the carrier for transportation at point of origin or after it is delivered by the carrier to the consignee at point of destination, and when the inquiry is confined within these limits there is no substantial dissimilarity in the circumstances and conditions pertaining to the transportation of the different shipments.

Said section 2 is an arbitrary rule of law and must be applied whenever and wherever the conditions named in that section exist. It does not begin to operate until the traffic is offered to the carrier for transportation at point of origin and ceases to operate as soon as the traffic is delivered by the carrier to the consignee at point of destination. It is affected by differences between different classes of traffic, but not by differences between different individuals. It applies only while the transportation service is being performed. It can not be

sed to regulate business done either before the transportation service begins or after it is completed, and its application can not be made depend upon the effect the application will have upon that business, such matters simply tend to prove either the wisdom or folly of enacting such a law, but those are matters exclusively within the jurisdiction of the national legislative authority. The presumption of law is that they were given due consideration by that authority, and the conclusion reached as manifested by the law enacted is not open to review by any other authority.

All of which matters and things the said defendant is ready to aver, maintain, and prove as this honorable court shall direct; and hereby prays to be hence dismissed, with its reasonable costs and charges in that behalf sustained.

THE INTERSTATE COMMERCE COMMISSION,
By *Secretary thereof, therenunto duly authorized.*

HENRY L. STIMSON,
United States Attorney,
Post-Office Building, New York, N. Y.

P. J. FARRELL,
1317 F Street NW, Washington, D. C.,
Solicitors for Interstate Commerce Commission.

WASHINGTON, DISTRICT OF COLUMBIA, ^{ss:}

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, having read the foregoing answer from Paragraph I to Paragraph XV thereof, both inclusive, and knowing the contents thereof, hereby make oath that the matters of fact therein stated are true, to the best of my knowledge, information, and belief.

Secretary of the Interstate Commerce Commission.

Subscribed and sworn to before me, H. S. Milstead, a notary public in and for said District of Columbia, this the day of November, 1908.

[SEAL.]

Notary Public.

EXHIBIT A.
THE BUCKEYE BUGGY COMPANY

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
Railway Company; the Baltimore & Ohio Railroad
Company; the Norfolk & Western Railway Company;
the Pennsylvania Company; and the Pittsburg, Cin-
cinnati, Chicago & St. Louis Railway Company.

Decided December 2, 1908.

1. Before allowing a carload rating to a carload shipment a carrier is entitled to require that the goods shall be loaded at one time and place, that but a single bill of lading shall be issued, and that the shipment shall be from

one consignor to one consignee, but when the goods are so loaded and by the terms of sale become the property of the consignee upon delivery to the carrier, the carrier has no right to inquire whether the consignee obtained his title from one or several owners; and if it accords the carload rate in case the consignor is the owner, failure on its part to extend the same privilege when the consignee is the owner, violates sections one, two and three of the act to regulate commerce. The rule in defendants' classification covering the application of carload rates to carload lots should be so modified as to accord the same rating to consignor and consignee when the condition of ownership after the property is delivered to the carrier is the same.

2. Upon the question whether a carrier may distinguish between a forwarding agent and the actual owner of the goods no opinion is expressed.

Henry M. Huggins for complainant.

Ed. Baxter for Norfolk & Western Ry. Co.

W. O. Henderson for Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co.

S. C. Bayless for Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.

F. A. Davis for Baltimore & Ohio Railroad Company.

P. J. Farrell for the Commission.

159 *Report and opinion of the Commission.*

PROUTY, Commissioner:

The Buckeye Buggy Company, the complainant in this proceeding, is a corporation under the laws of Ohio, engaged in the manufacture of carriages at Columbus, Ohio. The defendants are carriers by railroad and transport the product of the complainant from Columbus to various points in other states and territories and foreign countries. The complaint is that the defendants decline to allow the combination of carriages in carload lots at carload rates.

From eight to ten different concerns are engaged in the manufacture of vehicles at Columbus. These vehicles are of different kinds and different grades and seldom, if ever, does the same manufacturer produce all kinds and all grades; as a rule, a single grade and a limited variety are turned out. The dealer in carriages at most small country points will not purchase a carload of one kind or one grade, but desires to make up his carload of different kinds and grades. This means that he cannot buy a carload of a single manufacturer, but must procure part from one and part from another. Having purchased a carload in this manner, he wishes to combine them in a single carload shipment, thereby obtaining the carload rate, and for this purpose he instructs the various parties from whom he has made purchases to deliver their goods at the warehouse of some one of his vendors. This party loads the carriages into the car at one time and one place in exactly the same manner that they would have been loaded had the entire carload been bought from one company, and tenders the carload to the carrier for shipment to the owner as consignee. This, according to the testimony, is what the complainant and other carriage manufacturers at Columbus wish to do, and this the defendants decline to permit.

Rule 10 of the official classification provides that commodities of different kinds may be combined in carloads at the carload rate, the rate applicable to the entire carload being the highest which would be applicable to any commodity in the carload and the minimum weight being the highest which would be taken by any article in the carload. The operation of this rule is restricted by rule 5 (B) which is as follows:

"Rule 5 (B). In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one receiving station, in one day, by one consignor, consigned to one consignee and destination.

"Receiving agents will not sign shipping receipts bearing the notation 'part carload lot' until shipping receipts for the whole carload have been presented, and the freight delivered, in order that bill of lading may be obtained at the carload rate. Only one original bill of lading for the whole carload shall be issued.

"Receiving agents will not receive and consign shipments of property consisting of several consignments to delivering agents for distribution among several consignees; nor will agents at destination distribute such shipments of property among two or more consignees."

Rule 10 is still further limited by notes 2 and 3, which read as follows:

"Note 2. The foregoing rule will apply only on freight from one consignor or owner, and will not cover L. C. L. shipments of property from two or more consignors combined into carloads by forwarding agents claiming to act as shippers.

"Note 3. The term 'forwarding agents' shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors into carloads at points of origin."

The defendants did not altogether agree as to the interpretation of notes 2 and 3. Counsel for the Norfolk & Western Railway Company stated during the taking of testimony, and its general freight agent testified, that, if either the consignor or the consignee was the owner of the entire carload, the carload rating would be applied. Under this construction of the rule the complainant could accomplish all that it desires. Such was not, however, the construction given it by the other defendants. While their position was not altogether clear, and while the attorney for the Baltimore & Ohio Southwestern at one time stated that if title passed to the consignee by delivery to the carrier, the carload rate would be accorded, the position of the other defendants, and we think the position of that carrier, was that in all cases the owner of the property must deliver it to the carrier for shipment. The fact that the consignee became the owner under the contract of sale by delivery to the carrier for shipment was not enough; he must have actually taken possession of the goods and have become the owner in fact before the delivery to the carrier. This was the interpretation of the rule by

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Mr. Rainer, in charge of the bureau of inspection, having jurisdiction of Columbus, who was put forward as the principal witness by the defendants.

Mr. Rainer stated that these notes were first adopted to prevent the "forwarding agent" from doing business. The forwarding agent, according to his testimony, collects less than carload shipments of various kinds, combines these into carloads which he ships in his own name to some one consignee at the point of destination, who in turn receives the carload and distributes the various articles to the parties for whom they are intended. His profit in the transaction is the difference between the carload and the less than carload rating, and this he divides with his customers as an inducement to obtain their patronage. Mr. Rainer testified that this practice subjected the carriers to various kinds of inconvenience and led to endless discrimination between shippers. The case of the forwarding agent, or of the patron of the forwarding agent, was not presented and we have no knowledge, save what may come from general information, as to the advantage which may accrue to the shipping public from this method of handling less than carload business. The forwarding agent has never obtained much foothold in the railway operations of the United States; it is understood that he has been from the first an important factor in those of Great Britain, where he appears to be known as an intercepting agent.

Mr. Rainer was asked to state how the forwarding agent could transact business if the rule required that either the consignor or consignee should be the actual owner of the property. He has, after taking time for consideration, filed such a statement, but fails 162 to point out an instance in which this could be done. As a matter of fact it would be clearly impossible to conduct the business of a forwarding agent under those circumstances.

Carriages at Columbus are generally sold f. o. b. the cars at that point, so that the title passes to the consignee by delivery to the carrier, although in some few instances a lien is reserved by the vendor.

In case of purchasers residing in the vicinity of Columbus it is of no great practical importance whether shipment be made upon the carload or less than carload rate, but when the goods are to be sent long distances, as for example into the Southwest, it becomes a matter of considerable consequence. The less than carload rating from Columbus to Texas common points is \$2.65 $\frac{1}{2}$ per hundred pounds, the carload rate \$1.31, and the minimum carload 10,000 pounds. To ship this minimum at the carload rate would cost \$131.00, while at the less than carload rating the transportation charge would be \$265.50, a difference of \$134.50 to the purchaser. The testimony showed that this privilege of combination was of great value to most carriage makers at Columbus. One witness testified that a considerable part of his business was in the Southwest and that not over one-half this could have been done during the past year without the right of combination at the carload rate.

The immediate injury, resulting from a refusal of the carrier to apply the carload rating in the case before us, is to the purchaser, who has bought a carload of carriages which he desires to transport to destination; but ultimately the carriage manufacturer at Columbus is affected, since if his patron cannot ship in this manner he will seek some other source of supply.

For many years the complainant and others at Columbus have been accustomed to make these combinations. Notes 2 and 3 were first effective July, 1899, but no objection appears to have been entered against the continuance of the practice until recently. On January 28, 1903, the complainant received a letter from one Berry, district inspector under the direction of Mr. Rainer's bureau, calling attention to rules 5 and 10 and stating that combinations must not be made by consignors at points of origin. The last paragraph in the letter read,

"You must hereafter desist from this manipulation or this 163 bureau will be obliged to subject your shipments, in every case, to the L. C. L. rating, and will also make the matter one of report to the proper authorities." The complainant, fearing from this letter that it might not only be involved in difficulties as to the proper rating upon carload shipments furnished by it exclusively, but also that possibly some attempt might be made to proceed against it criminally, entered complaint to the Commission for the purpose of having its right in the premises defined.

CONCLUSIONS.

The broad question presented has reference to the right of a carrier in according a carload rating to look beyond the transportation itself to the ownership of the property transported. A carload of merchandise is offered for carriage, it is loaded at one time and one place, but a single bill of lading is required, the shipment is from one consignor to one consignee; under these circumstances may the carrier apply the carload rate if the goods are actually owned by the individual who offers them for shipment, and refuse it if they are not? This involves the right of the forwarding agent to do business.

The English Railway Equality Clauses are much like the second section of our own act, for which they undoubtedly furnished the model. The courts of that country have held after the most elaborate consideration that "like circumstances" refer to the carriage of the property, and that the carrier can not impose a higher rate when the property is tendered for shipment by an intercepting or forwarding agent than when offered by the owner. *Great Western R. Co. v. Sutton, L. R. 4 H. L., 226.*

The Supreme Court of the United States has held in *Wight v. United States*, 167 U. S., 512; 42 L. ed., 258; 17 Sup. Ct. Rep., 822, that the words "circumstances and conditions" in our own second section refer to carriage and not to competition, following to this extent the English cases.

Upon the other hand the Circuit Court for the Northern Division of the Northern District of Illinois has very recently held that the carrier may distinguish between the forwarding agent and the owner of the property and may apply the carload rating when the 164 goods are tendered for shipment by the owner, and may refuse it when like traffic is offered by the forwarder. *Lundquist v. Grand Trunk Western R. Co.*, 121 Fed. Rep., 915. The court in this latter case rested its decision mainly upon the proposition that liability to a greater number of suits, in case the carload was owned by several, created such a difference in circumstances and conditions as would avoid the operation of the second section.

To a lawyer this legal proposition may well seem to create a material difference in conditions; as applied to the actual transaction that difference is hardly substantial. Claims for loss or damage to property in transit make up a very small part of the operating expenses of a railway. It has been frequently said in testimony before us that risk of this kind is so small that it is not taken into account in fixing rates and the relation of rates upon most commodities. If the liability itself is not considered, still less important is it who may bring suit for the damage. There may be weighty reasons why rules against forwarding agents can be and should be adopted, but this is hardly one of them. No traffic manager ever promulgated notes 2 and 3 on this account.

The question can hardly be regarded as settled in this country. Assuming that the second section does not absolutely prohibit the enforcement of such a rule, it still must be a question of fact whether it is just under the first section and whether it unduly discriminates under the third. We do not, however, think that the justness or propriety of notes 2 and 3 in their general application is of necessity involved here. While the complaint is broad enough to raise that question, and while complainant insisted that it should be considered and decided, nothing which the complainant desires to do involves the functions of a forwarding agent, and we think the better way will be to confine our decision to the precise case as presented.

A reference to the statement of facts will show exactly what the privilege is for which the complainant contends. The vendee, who has purchased carriages of different manufacturers to the amount of a carload, desires to consolidate his purchases into a carload by having

them brought together at the warehouse of some one of his 165 vendors, and by that vendor loaded into the car and shipped to the address of the vendee as consignee. This we think should be permitted. The defendants may clearly require that the goods shall be loaded at one time and place; that but a single bill of lading shall be issued; that the shipment shall be from one consignor to one consignee; but, when these goods are so loaded, when by the terms of sale they become the property of the consignee upon delivery to the carrier, the carrier has no right to inquire whether the consignee obtained his title from one or from several owners. If they accord a

carload rating in case the consignor is the owner, they should extend the same privilege when the consignee is the owner. To make a distinction is to violate the first, second, and third sections; the first, because such distinction is without reason and therefore unjust and unreasonable; the second, because for the same service different charges are exacted; the third, because an undue and unreasonable preference is given to one person as against another.

The discussion before us has been mainly upon the second section and it will be sufficient to consider here the bearing of that section alone. This provides, in substance, that no carrier shall exact more from one individual than from another for the performance of the same transportation service under substantially similar circumstances and conditions. It seems to be conceded that the actual service rendered is the same whether the person tendering the carload for shipment is the owner or not, but it is contended that the circumstances and conditions surrounding the shipment are not the same in the two cases. The question before us is, are conditions different when the consignor is the actual owner of the entire carload from what they are when the consignee is such owner. The defendants rely upon four points of difference which may be mentioned separately.

It is charged in the first place that the adoption of this rule is necessary to protect the carrier from fraud and imposition in false billing, false weighing, etc. As applied to the forwarding agent proper, it occurs to us that there may be some practical force to this

contention. He makes his profit by securing a low freight
166 rate and naturally gives special attention to the various means
by which this may be accomplished. A dishonest man would
have greater opportunity and greater inducement than the ordinary
shipper, and might perhaps subject the railway to the exercise of a
greater degree of vigilance in protecting itself against this species
of fraud; but, as between the case where a consignor is the owner
and the case where a consignee is the owner, the argument is the
other way. The inducement to fraud appeals to the party who will
benefit by it. If the consignee is the owner he only gains by the
deceit; but if such deceit is practiced it must be by the shipper, and
he, when the consignee is the owner, has no direct inducement to
engage in such fraudulent practice. While it might happen that a
consignor would misrepresent at the request of his consignee the
liability to do so would be less.

It is said in the second place that inasmuch as the carload rate is less than the less than carload these defendants will lose in revenue if compelled to accord the carload rating. Beyond doubt the carrier loses in gross revenue whenever the lower carload rate is applied to the movement of commodities which would otherwise move at the higher less than carload rate. Whether their net revenue is diminished depends upon a variety of considerations. We have been often assured, in some instances as the result of actual tests, that the cost of handling less than carload business was much more in proportion than the difference in rate. However, there is no occasion to con-

sider this aspect of the matter. The question before us is not whether carriers shall grant the carload rating at all, but whether, having allowed it to the consignor, they can refuse it to the consignee. It might increase the revenues of these defendants if they were to give a carload rate to a single individual in each locality and deny it to all others, but this would be no ground for such discrimination.

The point most earnestly insisted upon by the defendants was that they would be subjected to greater annoyance and expense if question arose as to the loss or damage of the property. They urge that two classes of suits may be maintained against the carrier in such case, one upon the contract evidenced by the bill of lading, another in tort for the negligence of the carrier.

167 The first of these actions must be in the name of the shipper to whom the bill of lading was issued, or perhaps of his principal if he acted as a mere agent, but it is said that the second may be brought by each and every beneficial owner of the property injured. Upon that assumption it is manifest that in case of the forwarding agent, who consolidates into a single carload numerous shipments of different owners, the carrier might, if loss occurred, be subject to a great number of suits instead of a single suit as in the case of one owner. Such, however, could not be true if the consignee were the owner of the property. In a case like that presented in the statement of facts before us, clearly but one suit could be brought upon the bill of lading and but one suit could be maintained by the beneficial owner. No case can be conceived in which there would be less liability than this. It is conceded by defendants that if one person owned the entire carload of carriages which he had sold to different customers, f. o. b. Columbus, he might ship these at the carload rate to a single consignee for distribution. Here the company would be liable to one suit upon the bill of lading and to as many suits in tort as there were beneficial owners of the property.

It is contended finally that an application of this rule would tend to create discrimination between shippers. A factory located at some point by itself, which could not therefore combine its shipments, would be at a disadvantage compared with a similar factory located at Columbus where the benefit of combination could be enjoyed. This is undoubtedly true and affords the most serious objection, from our standpoint, to granting the privilege. It must, however, be borne in mind that the granting of a carload rate in any case is a discrimination against the less than carload shipper, who can not avail himself of that rate. We can see no reason why a consignor who has the means to procure or produce a carload of carriages should be given a carload rating while that rating is denied to a consignee who has the money with which to buy a similar carload. It must be noted further that if the privilege of combination is denied, the inevitable

168 tendency is to drive the small carriage manufacturer out of existence altogether, and center the business in establishments which can produce all varieties and all kinds so that the purchaser can buy an entire carload at a single factory.

The defendants insisted that they ought not to be required to accord the car load rate to those cases in which the consignee was the owner, because as a practical matter it was important for them to determine whether the representation of ownership was true or false; that they dealt with the consignor and could investigate the circumstances as to his ownership, while the consignee was usually at great distance. This contention, while specious at first, has little real merit. The carrier delivers as well as receives the property. If the distribution be over the same line, then the identical carrier which receives also makes the delivery and there is no reason to suppose that the question of ownership cannot be as easily determined at the delivering as at the receiving end of its line. Where, as is usually the case, the transportation is over two or more connecting roads they still form, for the performance of that service, a single line. The interest of the delivering carrier is exactly as great in securing a proper application of this rule as is that of the receiving carrier. Evasions will occur in either case, but they are no more likely to happen when ownership is required in the consignee than when it is required in the consignor.

It may be urged that this rule, in its present form, as interpreted by the defendants, permits in effect the same thing which in our judgment should be allowed, since the purchaser may appoint some person his agent at the point of shipment for the purpose of receiving the goods from his vendors and consigning them to him. And this is true; but in order to effect it there must be some agent with actual authority to take possession in behalf of the vendee; the title must have actually passed to the vendee before delivery is made to the carrier. This entails upon the consignee a certain amount of trouble and expense and forces him to assume a measure of responsibility which otherwise he would not. He is himself responsible in this case for the goods for a period of greater or less duration before they are delivered to the carrier, whereas in the other case the goods are the property of his vendor until delivery is made to the carrier,

which then becomes responsible for their safe carriage. One
169 serious objection to the present rule is that its spirit can be avoided by those who know how, while it is obligatory upon the great body of shippers. If the thing can now be effected by those who have knowledge and facility, the rule should be so amended that the whole public can understand and take advantage of it.

One of the questions discussed was as to what proof the carrier might require of ownership in the consignee. No rule of universal application can perhaps be laid down. As was said by the representative of one of the defendant lines, carriers must assume that they are dealing with honest men until they have reason to believe the contrary. It cannot be difficult to adopt such regulations as will protect the carrier without imposing undue hardship upon the shipping public. Any rule of general application should be specified in the tariff itself.

In the opinion of the Commission, the present rule should be so modified as to accord the same rating to consignor and consignee

when the condition of ownership, after the property is delivered to the carrier for transportation, is the same. Apparently the carriers would accomplish all they desire if there were substituted in place of notes 2 and 3 the simple statement that the carload rate would only apply in case either consignor or consignee was the actual owner of the property. An order will issue requiring the defendants to cease and desist from refusing to allow the carload rating in case the consignee is the owner of the property when such rating is allowed when the consignor is the owner. Whether the carrier may distinguish between the forwarding agent and the actual owner is not decided.

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EXHIBIT B.

171

IN THE MATTER OF PARTY RATE TICKETS.

Decided April 8, 1907.

Party rate tickets can not be limited to particular classes of persons, but must be opened to the general public.

Report of the Commission.

PROUTY, Commissioner:

On September 29, 1906, this Commission, in response to numerous inquiries, expressed the opinion that party rate tickets could not be limited to particular classes, but must be open to the whole public alike.

From this conclusion there was emphatic dissent upon the part of many carriers, and we were requested to hear argument with a view to reconsidering our opinion. This request was granted, and the matter was fully argued at Washington on December 11, 1906. The Commission found no reason in what was then said to reconsider its previous decision, but no public announcement to this effect was made.

A large number of carriers have filed tariffs confining the use of these tickets to amusements companies; and we are informed that there is an impression, arising out of the silence of the Commission on this subject, that we had finally concluded such tickets might be thus limited. Before taking steps to bring the matter before the courts for determination, it seems proper to state the contrary, and to indicate the reasons upon which we base our conclusion.

172 The Commission originally decided, in Pittsburg, Cincinnati & St. Louis Ry. Co. v. Baltimore & Ohio R. R. Co., 3 I. C. C. Rep., 465, that the party-rate ticket was unlawful as a discrimination under sections 2 and 3 of the act, and ordered the defendant company to cease and desist from the practice. In a suit brought to enforce this order the Supreme Court of the United States disapproved this holding of the Commission and decided that such tickets were lawful. (*Interstate Commerce Commission v. Baltimore & Ohio R. R. Co.*, 145 U. S., 263.)

The exact question presented to and decided by the court in that case was whether a carrier might lawfully transport ten or more persons upon a single ticket at one time as a party for a less sum per individual than it exacted from the general public for the transportation of a single person upon a single ticket. In answer to the claim that this was in violation of section 2 the court, at page 281, said:

"In order to constitute an unjust discrimination under section 2 the carrier must charge or receive directly from one person a greater or less compensation than from another or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.' To bring the present case within the words of this section we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale this is impossible."

This case determined that a railroad may properly issue party-rate tickets; it did not determine whether those tickets could be limited in their use to particular classes, as appears from the following language, also found on page 281:

"If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage."

The precise question now before us is, Can a railway lawfully charge less for the transportation of a party of ten persons belonging to an amusement company than it charges for the transportation of the same number of persons of some other occupation, although the two parties may be carried in the same car, at the same time, and between the same points?

Section 2 provides that the same charges shall be made to all persons for "a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." Plainly the service is like and contemporaneous.

173 The traffic is like unless it can be said that, when every other condition is the same, the carriage of ten actors differs from the carriage of ten farmers, merely for the reason that they move in different walks of life.

The real question is, then, Are the circumstances and conditions similar?

It is evident that these circumstances and conditions may be of two kinds:

First. They may refer to the circumstances of the carriage itself. For example, it costs a railroad less to transport passengers in a slow train than at a high rate of speed. It is generally accepted that

through transportation is less expensive than transportation over the same distance from point to point. The Supreme Court has declared that the carriage of a party of 10 persons upon a single ticket is a different transaction from the carriage of 10 individuals upon 10 different tickets. In all these instances the expense of the service to the carrier is different in the different cases. Now, it must be apparent that as to this class of circumstances, that is, in the act of the transportation itself, there is no distinction of circumstance and condition between the carriage of the 10 actors and the 10 farmers.

Second. Even though the cost of the service itself is the same, the results of that service to the railroad company may be different in different cases—that is to say, it may be for its interest to transport the members of one class at a less rate than is made to other classes in the community. Taking by way of illustration the case above suggested, it may well be for the advantage of the carrier to make a lower fare to the amusement company than it makes to the general public. It might not be able to obtain the traffic at all at its regular rates. The fact that these people travel may tend to stimulate travel of other persons, and so on. Circumstances and conditions of this kind may certainly differ with different individuals desiring carriage by rail, and if the carrier is at liberty to take account of facts of this nature it might be justified in extending the party rate to one class and in refusing it to another. The real question, therefore, is, Do circumstances and conditions, as that phrase is used in the second section, refer exclusively to the carriage of the property or the person; or do they include the commercial and competitive conditions which indirectly attach to the transportation?

In *Wight v. United States*, 167 U. S., 512, the court passed directly upon the application and meaning of the words "circumstances and conditions," as used in the second section. The facts in that case may be briefly stated.

174 One Bruening was a dealer in beer at Pittsburg, obtaining his supplies from Cincinnati. His warehouse was situated upon the track of the Pan Handle road, and beer shipped by that line from Cincinnati to Pittsburg was delivered directly into his warehouse without additional charge. The warehouses of his competitors at Pittsburg were not located either upon the Pan Handle or upon the Baltimore and Ohio, and beer transported from Cincinnati to Pittsburg for these competitors by either of these lines must be carted from the station to the warehouse. The rate by both lines was 15 cents per 100 pounds, and it is evident that Bruening would ship by the Pan Handle, since for that rate he could obtain a delivery into his warehouse.

The Baltimore & Ohio, for the purpose of obtaining a part of Bruening's business, allowed him the cost of transporting beer from its station in Pittsburg to his warehouse, upon the tracks of the Pan Handle road, and the question before the court was whether this allowance was legal. The Baltimore & Ohio Co. insisted that it might make the allowance for the purpose of meeting the competition

via the Pan Handle, and urged that Bruening was in no way benefitted, since he obtained a delivery into his storehouse at the same rate by either line; that the competitors of Bruening were in no way injured, since they must in any event pay cartage charges from the depot to their warehouses, and that the Baltimore & Ohio was benefited, since it obtained additional business. The court held, however, that the allowance to Bruening was unlawful under the second section, for the reason that the words "circumstances and conditions," as used in that section, were confined merely to the carriage of the property and could not be extended to include competitive and business considerations as well. In disposing of the case Mr. Justice Brewer used the following language:

"It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

"It may be that the phrase 'under substantially similar circumstances and conditions,' found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage and does not include competition."

At the term following the decision of the Wight case, Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S., 144, was disposed of. In this was involved the right of the carrier to charge less for the long than for the short haul, and the court had

175 occasion to consider and apply the words "similar circumstances and conditions," as used in the fourth section. It was

held that these words in that section did not apply simply to the circumstances of the carriage, but included competition; that, although the circumstances of the carriage itself were precisely the same, the fourth section was not violated if competition existed at the more distant point which did not obtain at the intermediate point, since that competition rendered dissimilar the circumstances and conditions.

To avoid any seeming inconsistency in giving to these words one meaning in the second section and an entirely different meaning in the fourth section, the court in the Alabama Midland case stated its position upon this point at considerable length, as follows:

"To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition

which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

"As we have shown in the recent case of *Wight v. United States*, 167 U. S., 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

"This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation, among which we find the fact of competition when it affects rates.

"In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of 176 the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration."

Here, then, we have two cases decided at substantially the same time—one necessarily holding that the words "circumstances and conditions" in the second section refer only to the carriage itself; the other holding that those words in the fourth section may be extended beyond the carriage, but expressly reaffirming the doctrine of the *Wight* case, that they must, in the second section, be confined to the transportation alone, and can not be made to include competitive and other considerations. So far as we can ascertain, this position of the Supreme Court has never been in any degree departed from by it.

It is urged that *United States v. Chicago & Northwestern Ry.*, 127 Fed. Rep., 785, is an authority to the contrary which ought to be controlling. That case was this:

The Chicago & Northwestern Ry. had in effect a party rate applicable to theatrical and amusement companies. The United States

Government claimed the benefit of this rate. It transported over the line of the railway company certain parties of troops, more than 10 in number, that being the minimum number to which the party rate applied, and insisted that in making settlement for the transportation of these troops it should be allowed the same rate per mile fixed by the party rate schedule of the railway company. The court below held otherwise, and the Circuit Court of Appeals affirmed that judgment. It held that the circumstances and conditions under which the troops were transported for the Government were not the same as those under which theatrical and other amusement companies were moved by the railway company, noting the following differences:

1. The party rate ticket is limited, whereas the Government requires a ticket of unlimited service.
2. The Government does not pay in advance for its ticket, but only settles after a considerable period of time and often after much annoyance and inconvenience and sometimes actual deduction.
3. Many amusement companies and similar organizations could not travel if obliged to pay the regular rate of fare. The giving of these reduced fares stimulates this kind of business and adds to the revenues of the railways without any corresponding increase in the cost of operation.
4. While these tickets are only sold from point to point on the line of a particular railway, it is reasonably certain that the company will buy more than the one ticket in going from place to place.
- 177 5. The traveling of amusement companies stimulates other kinds of travel. The performance of a great singer at some point upon the line of railway might induce hundreds of other persons to buy tickets to the same point, while the movement of ten soldiers would have no such effect.
6. The Government is not in any way in competition with any other members of the public in the movement of its troops, and hence there can be no unjust discrimination.

It is evident that the first of these distinctions may properly have reference to the carriage of the passenger, since it is generally recognized that there is a difference in cost between a limited and an unlimited service. It is possible that the payment of cash in advance might amount to a difference in the movement itself, although we do not express that opinion. It follows, therefore, that the Circuit Court of Appeals might have decided the particular case before it, as it did, without also deciding that party rate tickets need not be open to all members of the public who were willing to receive, pay for, and use those tickets upon the same terms and under the same conditions.

It is clearly apparent from a reading of the whole opinion that those facts mainly relied upon by the court as creating dissimilarity of circumstance and condition were of a character which the Supreme Court of the United States has expressly declared can not be considered for that purpose under section 2. The court quotes, with approval, the following language from the opinion of Sage, district

judge, delivered in disposing of the original party rate case in the Circuit Court:

"Again, the testimony establishes that party rate tickets secure patronage that yields large revenues to the respondent, and that the withdrawal of those tickets would almost entirely destroy that patronage, for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers. Are all these considerations to be left out of the account in determining whether there has been 'like and contemporaneous service' 'under substantially similar circumstances and conditions?' Does it depend solely upon whether party rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are traveling from the same point to the same destination? Is that the full meaning of 'similar circumstances and conditions?' The answer, which the question itself seems to suggest, is that the phrase has a much larger and more comprehensive meaning, else Congress could not consistently have recognized mileage or excursion or commutation tickets, for all these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation, the phrase must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons, or, in other words, circumstances and conditions of a commercial character."

178 When these words were written, and indeed when the party-rate case was decided by the Supreme Court, no distinction had been made between the application of the words "circumstances and conditions" to the fourth and second sections, nor between the undue preference of the third section and the discrimination of the second section. Since then it has been emphatically determined that facts of this character can not be relied upon to justify a difference in charge under section 2. Since they were manifestly used for that purpose by the circuit court of appeals in the Chicago & Northwestern case, we do not think the obiter dicta in that opinion can be regarded as authoritative, even though the exact case presented to the court may have been correctly decided.

It may be noted that the decisions of the English courts are of the same purport. Section 2 of our own act is modeled upon section 90 of the English railways clauses consolidation act of 1845, commonly known as the equality clause, which provides, in substance, that the same charge shall be made to all for the carriage of traffic of the same description over the same line, in the same direction, and under the same circumstances. It has been determined that the "circumstances" referred to must relate to the carriage itself, and that facts extraneous to that can not be considered.

The first important case was that of Evershed v. London & Northwestern Ry. Co., 3 App. Ca., 1029, in which the facts closely resembled those of our own Wight case. Evershed was a brewer at Burton whose brewery was not connected with any line of railway. Three other breweries were located in the same town and connected by siding

with the tracks of the Midland Railway, which delivered freight into their establishments without charge and made also an allowance for the furnishing of terminal and storage facilities by them. The tracks of the defendant railway were not connected with any of these breweries.

For the purpose of obtaining a share of the business of the breweries located upon the tracks of the Midland Railway the defendant carted the freight of those breweries free and made the same allowance on account of storage facilities which was made by the Midland Company. Both the defendant and the Midland Company charged the plaintiff for the cartage of his freight.

The court held that since the service performed by the defendant for the plaintiff and for his competitors was identical the charge for that service must be the same, and that the practice of the defendant, above stated, was unlawful.

Even more striking is the case of *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 11 App. Ca., 97.

179 The defendant railway was engaged in the transportation of coal from the South Yorkshire field to Grimsby, upon the sea-coast, and the plaintiff was a coal producer and dealer shipping his commodity via this line between these points. Coal was transported by the defendant to Grimsby both for land sale and for sea shipment, and the rate open to the public seems to have been somewhat less in case of that intended for sea carriage than with that for land sale. One Banister, who was a competitor of the plaintiff at Grimsby, was allowed a reduction from the rate for water shipment in the two following cases:

Upon coal sold by him to the Hamburg-American Steamship Company for its own bunker use and for transportation to and sale by it in the West Indies he was granted a rebate of 8d. per ton. The case showed that this was for the purpose of enabling him to sell this coal to that company in competition with other coals; that without the rebate he could not have engaged in this business, and that, indeed, even with it he had been forced to withdraw from the business before the bringing of suit by the plaintiff.

Upon coal shipped by him to certain ports south of Harwich he was allowed a rebate of 6d. per ton. This was by virtue of a contract that he should provide the vessels and other necessary capital for the purpose of developing a trade in this coal in these towns, where previously it had not been sold.

The plaintiff had never requested of the defendant, and would not in fact have used, a rate for either of these purposes.

Coal for land sale was delivered by the defendant at Grimsby to the plaintiff and to most other shippers upon team tracks in its own yards; but Banister and one other dealer had provided coal yards of their own with storage and unloading facilities, and their coal was run by the defendants into these yards. It was found that the defendant could handle coal more cheaply when delivery was made to Banister in his coal yard than when it was delivered to the plaintiff

upon team track. Banister was allowed a rebate on account of all coal delivered into his yard for land sale.

The court held that the rebates allowed Banister with respect to coal sold the Hamburg-American Steamship Company and with respect to that shipped to points south of Harwich were illegal, for the reason that the facts in consideration of which these concessions were allowed did not enter into the carriage of the property and could not, therefore, be used to show a difference in circumstances within the meaning of those words in the equality clause, but that since the cost of the service was less to the defendant when delivering Banister his coal into his yard, the rebate allowed on this account was lawful.

180 It will be seen that under the holding of both our own and the English courts section 2 prescribes a rigid rule of action. If the circumstances and conditions of the carriage itself are the same the charge must the same. We are unable to see how the carriage of ten persons belonging to an amusement company, as a party, differs from the carriage of ten other persons, as a party, in the same train, at the same time, and between the same points; and we are therefore of the opinion that the party rate tickets must be open to the general public.

We have not deemed it necessary to discuss the question of policy involved since, in our opinion, the decisions of the Supreme Court preclude such discussion. It may be observed, however, that these party rate tickets are not confined to amusement organizations, nor to organizations at all. They are being extended to the movement of parties of beet weeder, of oyster shuckers, of hop pickers, of coal miners. Nor is it correct to say that no competitive element is involved. Whether the harvest field or the coal mine shall be without laborers may depend upon the manner in which these very tickets are granted. To allow railway companies to accord to different individuals a different rate, when every incident of the carriage itself is the same, simply by reason of difference in vocation of the passenger, would, in our opinion, introduce a most dangerous practice.

That the man who sings is a different kind of traffic from the man who talks or the man who delves is certainly a novel proposition. The circumstances and conditions surrounding the transportation of these different individuals may be entirely different, but the Supreme Court has explicitly defined the limits within which such difference of circumstance and condition can be considered.

This is not a case in which any order can be made. We simply state, in answer to very many inquiries from interested carriers, what our interpretation of the law will be. If that interpretation is not accepted by the railways, we shall at once proceed to bring the question before the courts, where alone it can be authoritatively settled.

HARLAN, Commissioner, dissenting:

It was contended on the argument that carriers may establish party rates and lawfully limit their use to theatrical and concert companies, brass bands, boat clubs, football and baseball teams, and glee clubs,

and to similar associations regularly organized for the purpose of giving public exhibitions. The report for the majority overrules this contention and insists that party rates on interstate traffic can not be limited to such organizations, but must be open to all the traveling public. In this view I am unable to concur.

After an adequate return upon the investment has first been assured, the reasonableness of rates is a public question. The suppression of rebates and the elimination of unjust discriminations and undue preferences are a public necessity as well as public right. They are questions of public morality. But where no public principle or question of public policy is involved it seems to me a wise and sound course to so construe the law when possible as not to disturb long-settled usages and practices with which the traveling public, as well as the railroads, have become familiar. It is particularly important when dealing with so vast an industry as transportation to rest our conclusions whenever possible upon practical rather than upon technical grounds. And within the limitations imposed by law it is essential, as well in the interest of the public as of the carriers, that railroad officials shall have every opportunity for the exercise of their abilities and be permitted to make use of every lawful and legitimate expedient to produce the best results from the properties committed to their management; for increased earnings mean better facilities, greater efficiency, and lower rates for the public at large.

The opinion of the majority seems to me to proceed in disregard of these very important considerations. It not only withdraws from railroad managers a means of increasing the traffic over their lines, heretofore regarded as sound and effective, but it suddenly uproots a practice that for more than a generation has been thoroughly understood by the public and regarded as both legitimate and reasonable. Party rates limited to amusement companies have been established and in use on American railways for many years, and are in force at this time on the greater number of the more prominent lines. Even on the lines that have a party rate open to the general public, special privileges, in the way of baggage allowances or rules permitting scenery, costumes, performing animals, and other theatrical paraphernalia and effects to be carried as personal baggage, are usually accorded to traveling organizations engaged in the entertainment or instruction of the public. It may therefore be said that either in the rates themselves or by way of special baggage privileges, practically all the carriers now make and for many years have made party rates limited to such organizations.

They have done this not as a matter of favor, but as a matter of necessity. Such traffic, now grown to large proportions, would not be able to move at the regular rates. The testimony in several cases that have reached the courts has made this clear. In *United States v. Chicago and Northwestern Railway Company*, 127 Fed. Rep., 785, 790, it is said:

"By giving these party rates the public interest in amusements of this character is subserved, as well as the interest of the railroad companies, and it would frequently happen that these amusement companies could not travel if they were charged regular rates."

182 In Interstate Commerce Commission v. Baltimore and Ohio Railroad Company, 43 Fed. 37, 61, it is said "the withdrawal of these tickets would almost entirely destroy that patronage, for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers." Statements to the same effect were made before us on this argument. It may be accepted, therefore, as a fact that theatrical and other amusement companies require this concession in rates in order to continue in business.

Some of the lines, under the previous announcement by the Commission and before they knew that this question was to be reargued before us, withdrew their party rates rather than submit to the loss of revenues incident to the opening of such rates to the public. Assuming that other carriers will now feel compelled to adopt the same course, the conclusion reached by the majority will be rather far-reaching in its consequences. To the more prominent theatrical and operatic companies and musical organizations the withdrawal of such rates might not be a matter of vital concern. But to the innumerable smaller and less important organizations engaged in one form or another in the entertainment, amusement, or instruction of the public in smaller communities the withdrawal of party rates, which usually are one-third less than regular rates and sometimes one-half, would be a very serious blow. Ordinarily they give but one performance in each community and then move on to the next community. Much of their time is therefore spent upon the railroads and a large part of their expense consists of the cost of transportation. Besides providing amusement or instruction for the small towns, the smaller organizations afford a livelihood throughout the country for a very large number of persons. Moreover, many small theaters and opera houses and places for public gatherings have been erected here and there to accommodate such companies. The withdrawal of such rates would seriously impair these small property investments. It would also leave a very large proportion of the people without diversions of that kind and without the entertainment and instruction to which they have been accustomed. On the other hand, if the carriers, rather than give up their earnings from such organizations, should accept the other alternative and open their party rates to all, the result will be a very substantial loss in revenue to them without any corresponding advantage to the general public. While many people can doubtless arrange to travel together in parties of ten or more, it is not likely that the public at large will be able often to do so. The decision of the majority will therefore give to the few a benefit that the public at large can not enjoy, and will thus introduce an inequality in rates that was not contemplated by the statute.

183 The majority opinion is based upon a construction of section 2 of the act. *And Wight v. United States*, 167 U. S., 512, and *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U. S., 144, are cited in support of the contention that the phrase "under substantially similar circumstances and conditions" as used in that section refers only to the circumstances and conditions of the carriage itself and not to competitive and other considerations. The thought is clearly expressed in the prevailing opinion in the statement that it is difficult to see "how the carriage of ten persons belonging to an amusement company, as a party, differ from the carriage of ten other persons, as a party, in the same train, at the same time and between the same points." The substance of section 2 is to declare it an unjust and unlawful discrimination for a carrier to charge one person a greater or less sum "in the transportation of passengers or property" than it charges or demands from any other person for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The prevailing opinion does not concede that there can be a difference in kind with respect to passenger traffic. It seems to disregard the words "like kind of traffic," as if they had no meaning. It insists, as I understand it, that ten passengers traveling as a party can not lawfully be dealt with by the carrier as a traffic proposition differing in any respect from another group of ten persons traveling on the same train as a party. It says:

"The traffic is like, unless it can be said that, when every other condition is the same, the carriage of ten actors differs from the carriage of ten farmers merely for the reason that they move in different walks of life."

It is also said:

"To allow railway companies to accord to different individuals a different rate, when every incident of the carriage itself is the same, simply by reason of difference in vocation of the passenger, would, in our opinion, introduce a most dangerous practice. That the man who sings is a different kind of traffic from the man who talks, and the man who delves, is certainly a novel proposition."

It is to be understood of course that the practice complained of by the majority is not a new one. As has been said, it is a very old practice, understood alike by the public and by the carriers. In the next place, to assert that the man who sings has no greater right in transportation than the man who delves, or the man who acts than he who farms, is to approach the question, as it seems to me, from a very narrow point of view. If the problem before us is to be considered as broadly as it is presented upon the record, the real question is, whether there is any distinction, as a traffic proposition, between

184 ten passengers who travel together as an organization in pursuit of their vocation in life, which is to amuse or instruct the public by public exhibitions, and ten other persons of the general public who travel together in pursuit only of the lower rates of which this decision enables them to take advantage. The travel of

such organizations, as it seems to me, is altogether a different kind of traffic and produces different results to the carriers. In the first place, as has already been shown, the carriers could not secure such traffic at the regular rates. They were compelled to make special rates. But they were not made for the benefit of one class at the expense of another class. They were made for the benefit of the carriers and to secure a traffic that otherwise would be lost to them. This thought must not be lost sight of. We are not dealing here with one class of travelers who are in competition with another class and get more favorable rates, and thus have an advantage over others. We are dealing with special rates made for a special class of organized travelers who stand apart from all other travelers and have no competitors. The published schedules are intended to include all associations that customarily travel together as a body for some common object and purpose. They are not intended to give special rates to some such associations and deny them to others. The purpose is to include all associations engaged in giving public exhibitions.

The suggestion that party rate tickets in actual practice are not limited by some carriers to amusement companies, but are being used for the movement of coal miners and harvesters, is not relevant on this record. The point presented for our consideration is whether a railroad company has the lawful right to establish party rates and limit their use to organizations engaged in giving public exhibitions, thus securing a traffic that would be lost to it at the regular rates. By making a special rate for such organizations, they are fostered and encouraged and an extensive traffic is assured to the carriers. Such organizations usually go from one end of a railroad system to the other, stopping at intermediate points to give their performances. The movement often involves a return journey, and this was one of the reasons why such rates were originally given to them, just as a special rate is ordinarily given to a single traveler on a round-trip ticket. It was also found that public exhibitions induced others to travel in order to attend them. It is common knowledge, for instance, that a great football game, or boat race, or a great athletic meeting will bring together literally thousands of people, many of them from distant points. In a less degree theatrical, operatic, and other public performances accomplish the same results. This is another and a very sound reason justifying the carriers in encouraging such exhibitions as a means of stimulating travel over 185 their lines at regular rates. No such results accrue to the carriers when ten persons agree to travel together, not because they have a common object and purpose in doing so, but simply in order to take advantage of lower rates. That is not the same kind of traffic. The members of theatrical companies must travel together and can not travel separately. They have a common occupation and a common purpose in being together. Each member of such an organization is necessary to the others. The organization can not proceed with its business unless all are together. They have baggage and effects that are common to them all and must go with all. Ordin-

narily they have a common manager or some person to look after the transportation and, usually, to supply the funds for it. It is organized travel. Much of the time of such organizations is spent upon the railroads, and, as has been said, a large proportion of their expense is for transportation.

This kind of traffic, I submit, differs very essentially from a party of ten or more persons that may have no relation to one another or any common object or purpose in traveling together except to get the benefit of lower rates. To such a party one person is as useful as another to make the required number. The only object to be accomplished in getting together is to secure the lower rates. And if they can not come together naturally and of their own accord, the brokers and ticket scalpers will find it profitable, under this decision, to advertise and bring them together. Such traffic is not organized travel. Such persons do not need a concession in rates to enable them to travel. And the result of such traffic to the carriers, if carried on party rates, is simply to deprive them of the full rate that the public as a whole has to pay when it travels. To such persons the party rate would be simply a fortuitous advantage of which they may avail themselves, but which is not justified or required by the circumstances or conditions under which they travel. They do not induce others to travel as do the amusement companies. Such travel does not result in building up traffic, as do such companies. In my judgment it is a different kind of traffic.

The views here expressed seem to me to be fully supported by United States v. Chicago & North Western Railway Company, 127 Fed. Rep., 785, where the railroad company denied party rates to a movement of federal troops. It is said that the decision in that case sustains the railroad company on the ground that its published tariffs required payment in cash for a party rate ticket, while the custom of the Government is to pay for transportation upon written requisitions, which ordinarily take several months to get through the accounting offices of the Government. While that fact is in the case, it is treated only as an incident in the decision. The Government

has always paid for transportation upon requisition, and that
186 objection would be as valid in the purchase of a single ticket as in the purchase of a party rate ticket.

The published tariff in that case limited the party rate to "theatrical, operatic, or concert companies, glee clubs, brass or string bands, baseball, polo, or football teams, and other parties of like character regularly organized for the purpose of giving exhibitions and traveling together." The court says (p. 789):

"It is clear that the Government does not fall within any of the designations of persons or parties named in the schedules. There is no analogy or likeness between the business of the Government in the transportation of its soldiers and the various classes of persons described in the company's schedules. Under no possible construction of the language can it be claimed that the United States comes

within the party rule. The Government's business is not like that of a theatrical, operatic, or concert company, or a hunting or fishing party, and it bears just as little likeness to any of the other parties named, as glee clubs, brass bands, boat, baseball, polo, or football teams; nor is it, in the language of the schedules, a party of like character to any of these, regularly organized for the purpose of giving exhibitions and traveling together."

There seems to be nothing in the decided cases in support of the conclusions reached by the majority, unless it be the dictum referred to in the prevailing opinion from Interstate Commerce Commission v. Baltimore & Ohio Railroad Company, 145 U. S., 263, where the court upholds the general legality of party rate tickets in a strong opinion, in which, incidentally and apparently not with reference to the language of section 2 of the act, but of section 3, it suggests that a party rate limited to theatrical troupes might present a question of undue preference or advantage. But it is apparent that this thought is thrown out, not as a point decided by the court but as a question for consideration only. On its face the quotation bears the warning of the court that it was not otherwise intended. In my judgment the Commission is not warranted in accepting the dictum as controlling, in view of the fact that the practice of limiting party rates to amusement companies is more than a generation old and has been thoroughly understood and acquiesced in by the public at large.

It is proper to add that the prevailing opinion is entirely inconsistent with other rulings of the Commission recognizing the right of carriers to issue excursion tickets and to limit their use to members of a particular association or society or to delegates to a particular convention. We have also expressed our approval of round-trip tickets limited to the use of government employees in returning home to vote at public elections. Those rulings can not logically stand with the majority opinion in this matter. If a government employee

going home to vote may be transported in the same train and
187 at the same time and between the same points with another citizen, at a special rate that is denied to the latter, and if a group of delegates to a particular convention or members of a particular association may be transported in the same train and at the same time and between the same points with other groups of citizens, at a special rate that is denied to the latter, it is difficult to see upon what basis it is now said that special rates for organizations engaged in giving public exhibitions may not be limited to their use, but must be opened to the general public. The burden of reconciling these several rulings rests with the majority.

For these reasons I am constrained to withhold my assent to the conclusions announced in the prevailing opinion.

I am authorized by the Chairman of the Commission to say that he concurs in these views.

COCKRELL, Commissioner, did not hear the argument or take any part in the decision of this matter.

(Endorsed:) U. S. Circuit Court, Southern District, New York.
Filed Nov. 27, 1908. John A. Shields, clerk.

88 *Replication.*

In the Circuit Court of the United States, for the Southern District
of New York.

THE DELAWARE, LACKAWANNA AND WESTERN
Railroad Company, The Wabash Railroad
Company, The New York, Chicago & St.
Louis Railroad Company, and The Baltimore
& Ohio Railroad Company, complainants,
vs.

In equity. October
term, 1908.

INTERSTATE COMMERCE COMMISSION, THE Ex-
port Shipping Company, and Edward B.
Boise, as trustee in bankruptcy of The Export
Shipping Company, defendants.

Replication of the Delaware, Lackawanna and Western Railroad
Company, the Wabash Railroad Company, the New York, Chi-
cago & St. Louis Railroad Company, and the Baltimore & Ohio
Railroad Company, to the answer of the Interstate Commerce
Commission, one of the defendants above named:

These replicants, saving and reserving to themselves now and at
all times hereafter, all and all manner of advantages of exception
which may be had and taken to the manifold errors, uncertainties,
and insufficiencies of the said answer, for replication thereunto say,
that they will aver, maintain, and prove their bill to be true, certain,
and sufficient in the law to be answered unto by the said defendant,
and that the said answer of the said defendant is uncertain, evasive,
and insufficient in law to be replied unto by these replicants; without
this, that, or other matter or thing in the said answer contained,
material or effectual in the law to be replied unto, confessed or
avoided, traversed or denied, is true; all of which matters and things
these replicants are ready to aver, maintain, and prove as this
189 honorable court shall direct, and humbly pray as in and by
their said bill they hath already prayed.

WILLIAM S. JENNEY.

DOUGLAS SWIFT.

Solicitors for Complainants.

(O. & P. O. address, No. 90 West street, New York.)

HUGH L. BOND.
JOHN H. CLARKE,
CLYDE BROWN,
GEORGE S. PATTERSON,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed
Nov. 14, 1908. John A. Shields, clerk.

190 *Notice of Appearance.*

United States Circuit Court, Southern District of New York.

DELAWARE, LACKAWANNA & WESTERN RAIL-
road Company, Wabash Railroad Com-
pany, New York, Chicago & St. Louis
Railroad Company, Baltimore & Ohio
Railroad Company, complainants,

against

INTERSTATE COMMERCE COMMISSION, EXPORT
Shipping Company, and Edward B. Boise,
as trustee in bankruptcy of The Export
Shipping Company, The American For-
warding Company, Trans-Continental
Freight Company, and Rockford Manu-
facturing & Shippers' Association, de-
fendants.

In equity. No. 3-141

Please to enter our appearance as solicitors for The American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, defendants in the above-entitled cause.

Yours, &c.,

MASTEN & NICHOLS,

Solicitors for The American Forwarding Company,
Trans-Continental Freight Company, and Rock-
ford Manufacturing Shippers' Association.

To JOHN A. SHIELDS, Esq.,
Clerk United States Circuit Court,
Southern District of New York.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. File
 Mar. 1, 1909. John A. Shields, clerk.

191 United States Circuit Court, Southern District of New York

DELAWARE, LACKAWANNA & WESTERN RAIL-
road Company, Wabash Railroad Com-
pany, New York, Chicago & St. Louis
Railroad Company, Baltimore & Ohio
Railroad Company, complainants,

against

INTERSTATE COMMERCE COMMISSION, Ex-
port Shipping Company, and Edward B.
Boise, as trustee in bankruptcy of The Ex-
port Shipping Company, The American For-
warding Company, Trans-Continental
Freight Company, and Rockford Manu-
facturing & Shippers' Association, de-
fendants.

In equity. No. 3-141

The joint and several answer of The American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturing and Shippers' Association to the bill of complaint:

The American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturing and Shippers' Association, defendants in the above-entitled cause, now and at all times hereafter saving and reserving to themselves all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or unto so much or such parts thereof as these defendants are advised, is or are material for them to make answer unto, by leave of court first had and obtained, jointly and severally answer and say that these defendants adopt as their answer to said complainants' bill of complaint the answer to said bill of complaint of the defendant, the Interstate Commerce Commission, heretofore filed herein, and these defendants pray that the said answer of said Interstate Commerce Commission be considered as included in this answer of these defendants as fully as if said answer of said Interstate Commerce Commission had been written into and incorporated into this answer of these defendants.

**THE AMERICAN FORWARDING COMPANY,
TRANS-CONTINENTAL FREIGHT COMPANY,
ROCKFORD MANUFACTURERS AND SHIPPERS' ASSOCIATION,**
By MASTEN AND NICHOLS,
Their Solicitors.

ARTHUR H. MASTEN,
FRANK K. HOFFMAN,
Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Mar. 2, 1909. John A. Shields, clerk.

In the Circuit Court of the United States for the Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, The Wabash Railroad Company, The New York, Chicago and St. Louis Railroad Company, and the Baltimore and Ohio Railroad Company, complainants,

against

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company, The American Forwarding Company, The Trans-Continental Freight Company, and the Rockford Manufacturers and Shippers' Association, defendants.

In equity. October term, 1908. No. 3-141.

Replication of The Delaware, Lackawanna and Western Railroad Company, The Wabash Railroad Company, The New York, Chicago and St. Louis Railroad Company, and The Baltimore and Ohio Railroad Company, to the joint and several answers of The American Forwarding Company, The Trans-Continental Freight Company, and The Rockford Manufacturers and Shippers' Association, defendants above named:

These replicants, saving and reserving to themselves now and at all times hereafter, all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the said answer of the said defendants is uncertain, evasive, and insufficient in law to be replied unto by these replicants; without this that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by their said bill they hath already prayed.

WILLIAM S. JENNEY,

DOUGLAS SWIFT,

Solicitors for Complainants.

(Office and post-office address, No. 90 West street,
Borough of Manhattan, New York City.)

HUGH L. BOND,

JOHN H. CLARKE,

CLYDE BROWN,

GEORGE S. PATTERSON,

Of Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed
Mar. 9, 1909. John A. Shields, clerk.

193 *Notice of motion on application for an injunction pendente lite.*

In the Circuit Court of the United States, for the Southern District
of New York.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, The Wabash Railroad Company, The New York, Chicago and St. Louis Railroad Company, and The Baltimore and Ohio Railroad Company, complainants,
vs.

In equity. October term
1908. No. .

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, and Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company, defendants.

SIRS: You will please take notice, that upon the bill of complaint, filed herein on the 15th day of October, 1908, and the affidavits of William S. Jenney and Burns D. Caldwell, each verified the 29th day of October, 1908, with copies of which said papers you are here-with served, upon the stenographer's minutes of the testimony taken and proceedings had before the Interstate Commerce Commission on the 23d day of October, 1907, and on the 20th day of December, 1907, in a certain proceeding in which The Export Shipping Company was complainant and The Delaware, Lackawanna and Western Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Wabash Railroad Company, and The Baltimore and Ohio Railroad Company were defendants; and upon the report, order and opinion in said proceeding dated the 22d day of June, 1908, an application will be made to this court, at a regular motion term thereof, appointed to be held at the United States Circuit Court room, in the general post-office building, in the Borough of Manhattan, city, county and State of New York, on the 9th day of November, 1908, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order herein suspending the enforcement of said order of June 22d, 1908, of the said Interstate Commerce Commission, and enjoining and restraining any and all proceedings thereunder pending the hearing and determination of this cause, and for such other and further relief in the premises as may be just and as the circumstances of the case may require.

Dated, New York, October 29th, 1908.

Yours, &c.,

WILLIAM S. JENNEY,
DOUGLAS SWIFT,
Solicitors for Complainants.

(Office & post-office address, 90 West street, Borough of Manhattan, city of New York.)

TO THE INTERSTATE COMMERCE COMMISSION, THE EXPORT SHIPPING COMPANY, and EDWARD B. BOISE, as trustee in bankruptcy of The Export Shipping Company.

195 In the Circuit Court of the United States for the Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, The Wabash Railroad Company, The New York, Chicago and St. Louis Railroad Company and The Baltimore and Ohio Railroad Company, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, and Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company, defendants.

In Equity. October term,
1908. No. .

STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss.

WILLIAM S. JENNEY, being duly sworn, deposes and says: I am the vice-president and general counsel of the Delaware, Lackawanna and Western Railroad Company, one of the complainants herein. Together with John G. Wilson, esq., general attorney of the Baltimore and Ohio Railroad Company, and J. H. Clarke, esq., general counsel of the New York, Chicago and St. Louis Railroad Company, I had charge of the proceedings before the Interstate Commerce Commission, in which the Export Shipping Company was complainant,
196 and the Delaware, Lackawanna and Western Railroad Company, the Wabash Railroad Company, the New York, Chicago and St. Louis Railroad Company and the Baltimore and Ohio Railroad Company were defendants, which resulted in the order herein complained of.

Said proceedings arose from three petitions of the Export Shipping Company filed with the Commission, and served upon the complainants herein on or about the 19th day of April, 1908, one of which was directed against the Delaware, Lackawanna and Western Railroad Company and the Wabash Railroad Company, as defendants, another against the Delaware, Lackawanna and Western Railroad Company and the New York, Chicago and St. Louis Railroad Company, as defendants, and the third against the Baltimore and Ohio Railroad Company. Thereafter said complainants separately served and filed with the Commission their answers in the said proceedings, whereupon a day for hearing was set for October 23d, 1907. On said day a hearing was had and evidence taken in the city of New York, before Commissioner Knapp, and the issues in all three proceedings being identical, it was stipulated and agreed that the three proceedings should be consolidated and tried as one before the Commission, which was done. Thereafter, a second hearing was had at Washington, D. C., before Commissioner Knapp, on December 20th, 1907, and further evidence taken therein. On the said hearings, since the issue that complainant before the Interstate Commerce Commission desired to raise was not properly and fully set forth in the pleadings, it was stipulated and agreed that the question at issue was the legality of the note to "Rule 5-B" and of "Rule 15-E and note" of the Official Classification, set forth in the bill of complaint herein, tested by the requirements of an act of Congress entitled,

"An act to Regulate Commerce," approved February 4th, 1887,
197 and acts amendatory thereof and supplementary thereto, and particularly by the requirements of section 2 of said act, as amended.

Thereafter, to wit, on the 22d day of June, 1908, said Interstate Commerce Commission made and on July 28, 1908, duly served on the complainants herein its report and order, a copy of which is attached to the bill of complaint herein. Whereupon the complainants herein brought this their suit by the filing of their bill of com-

plaint with the clerk of this court on the 15th day of October, 1908, for the purpose of obtaining a final decree, declaring the said order invalid and restraining any and all proceedings thereunder.

Complainants herein are common carriers, engaged in the interstate transportation of persons and property throughout a large part of the territory of the United States east of the Mississippi River and north of the Ohio and Potomac rivers, commonly known as Official Classification territory. For a great many years past all the railroads operating in said territory have provided in respect to nearly all articles of freight transported in carload and less than carload lots lower freight rates for carload shipments than for less than carload shipments of freight of the same class. In addition to this they have permitted carloads of mixed freight of different classes to be shipped at the carload rates applicable to the highest classes of freight contained in said carloads. The railroads have, however, limited this right to ship carload lots at the carload rate by "Rule 5-B and note" and "Rule 15-E and note" contained in the Official Classification, which required that in order to secure the carload rate on a carload shipment either one consignor or consignee shall be the owner thereof. These rules prevent the successful operation of forwarding agents, such as the defendant herein, the Export Shipping Company, in Official Classification territory.

198 The business of the forwarding agent consists of assembling the less than carload shipments of several separate and distinct shippers and combining them into a carload, which it tenders to the railroad company as a carload shipment, and on which it seeks to secure a carload rate. If it is successful in securing such rate, it divides with the several less than carload shippers of the goods contained in said carload the difference between the less than carload rates applicable to the said several less than carload shipments and the carload rate which it secures from the railroad company. This business results, of course, in giving to the said less than carload shippers lower rates than they could otherwise secure from the railroad company and in substantial profits to the forwarding agent.

The rules "5-B and note" and "15-E and note," above mentioned, are designed to prevent such carload shipments of forwarding agents from being made at the carload rate, and require the application to such shipments of the less than carload rates applicable to the several less than carload shipments contained therein.

The business of forwarding agents is a profitable one, requiring small capital. Provided carload rates can be secured for their shipments, the field for the operation of forwarding agents within the Official Classification territory is very large because of the great many carload ratings provided by the railroads in that territory and the extensive privileges given in the way of combining into a carload, taking the carload rate, freight of all kinds and descriptions. Even where the opportunities for shipping at the carload rate are few, as in the Southern and Western Classification territories, forwarding agents have found it profitable to operate. Should the present

199 limitations upon their operation within the Official Classification territory be removed, there can be no question that they will greatly increase in number and in the extent of their operations. I am informed, and verily believe, that a number of parties are now contemplating entering into the business, if the principle is established that the railroad companies must apply carload rates to their consolidated carloads.

The following circulars, recently sent out by the International Forwarding Company of Chicago, indicate the increase in the number and in the extent of the business of forwarding agents, which may be expected, should the order of the Commission be sustained, and I am informed and believe that similar circulars have been distributed by other forwarding agents.

INTERNATIONAL FORWARDING COMPANY,

MANHATTAN BUILDING,

Chicago, Ill., July 27th, 1908.

GENTLEMEN: Owing to a decision rendered to-day by the Interstate Commerce Commission at Washington, D. C., we are again in a position to handle L. C. L. shipments of picture frames to New York at a great saving in freight charges.

It is our intention to have cars placed at convenient team tracks throughout the city, giving shippers the benefit of a rate f. o. b. our cars Chicago 60 cents f. o. b. cars New York of 60 cents per cwt. or 15 cents per cwt. less than the regular tariff rate on this commodity. We will have on an average of two to three cars to New York

each week, and in case that you should decide to favor us with 200 your L. C. L. shipments to that point, we can assure you of excellent service. We will have our own experienced men to do the loading on the team tracks consigning cars to our New York office, who will take care of the distribution in this city, collecting the freight charges from either yourselves or consignees.

It might be well for you to take this matter up with your customers at New York, advising them of the reduced rates you can obtain on their L. C. L. shipments from Chicago, as this might help to stimulate your business.

Trusting that we will receive your support in this proposition, we remain,

Yours, very truly,

INTERNATIONAL FORWARDING COMPANY,

(Signed)

M. FRANKFURTER.

P. S.—The above rates also apply on shipments for export via New York.

CHICAGO, Ill., August 10th, 1908.

A. S. KLEIN Co.,

204-206 S. Green St., City.

DEAR SIRS: "Keep a thing 7 years, and you will find use for it." (Old proverb.)

Since 1901, when the various railroad lines operating under the rules of the Official Classification introduced regulations which discriminated against the right of an authorized agent of shippers to ship carloads made up of less than carload shipments at the carload rate, we have kept steadily in mind the ultimate prospect of overcoming these unfavorable conditions.

201 Under the recent broad and sweeping decision by the Interstate Commerce Commission, this discrimination is declared unjust, unfair, and unreasonable and a carrier may not properly look beyond transportation to the ownership of a shipment as a basis for determination of the applicability of carload rate.

We are, therefore, prepared to offer you reduced rates on your less than carload shipments between distributing points or for export, and will make up and submit to you immediately, special rates for transportation of such commodities as you may be shipping or receiving between your city and eastern seaport points or manufacturing or distributing centers.

Our rate will be available to either the shipper or consignee, whoever pays the freight, and will result in a substantial saving from the present less than carload rate. We have arranged for central loading terminals in Chicago, where incoming freight can be handled absolutely without delay, and Chicago shippers will not be obliged to team their shipments to remote points or to incur heavy cartage expense to reach our terminals. Our service will be regular, and equal to the best freight merchandise cars.

If you are interested in east or west bound freight shipments and desire our proposition to be explained to you in detail simply fill out a list of the commodities which you ship or receive, with the names of your principal consignees, and state at what time it will be convenient for our representative to call.

The enclosed postal card, stamped and addressed, need only be filled out with your signature and this date.

Yours truly,

(Signed)

INTERNATIONAL FORWARDING CO.

FRANK B. SMITH, Manager Domestic Traffic.

202 While the business is profitable to the forwarding agents, it must have a very serious and detrimental effect upon the great majority of less than carload shippers throughout the country and upon the business and revenues of the railroads.

The extensive operation of forwarding agents must necessarily result in discrimination among less than carload shippers through the country, both in the matter of rates and service. The forwarding agent is not subject to the interstate commerce act, nor to any control by the Commission, and is under no obligation to publish its charges for its services in securing to less than carload shippers rates lower than the published less than carload rates of the railroads. It charges for its services a proportion of the difference between the less than carload rate which the shipper would, in the absence of

the forwarding agent, have to pay the railroad company and the carload rate which the forwarding agent secures from the railroad company. In other words, the forwarding agent and the shipper divide the difference between the less than carload and the carload rates on whatever basis they may have agreed upon. The rate actually paid by the less than carload shipper is the less than carload rate plus the charge of the forwarding agent. It thus appears that a forwarding agent may charge one shipper one rate for the transportation of his goods, another shipper a different rate. The only limit to this fluctuation in rates is the difference between the carload and less than carload rates of the carrier. Each shipper, so to speak, pays according to the bargain he can make with the forwarding agent. Of course the latter will have inducements to furnish some shippers better rates than others, because of competitive conditions, the large amount of traffic which some shippers control and like considerations affecting the interests of the forwarding agent.

203 Some shippers it may refuse arbitrarily to serve at all. Furthermore, the forwarding agent can operate profitably only in cities from which a considerable amount of less than carload traffic moves. Less than carload shippers in small places, being deprived of the services of the forwarding agent, will, therefore, be put at a fatal disadvantage in competing in common markets with the more fortunate less than carload shippers in the cities. Discrimination will not only exist in the matter of rates, but also in the matter of transportation services. The forwarding agent, being influenced by the large amount of traffic which a certain shipper controls and by competitive conditions surrounding the business, will be free to grant favors to such a shipper which it denies to less important shippers. The freight of the favored shipper may be given precedence in movement and various other special inducements, carriage, payment of claims, etc., may be offered.

Of course the rates which the forwarding agent charges are secret and flexible. Less than carload shippers will be unable to know what rates their competitors are securing.

The effect of the general operation of the forwarding agent upon small jobbers throughout the country must be little short of disastrous. The minimum price at which the jobber can sell to the retailer within his territory is fixed by the cost of the article plus incidental expenses and the transportation charge from the large producer or manufacturer to himself, and from himself to the retailer. This transportation charge is usually made up of a carload rate on the wholesale shipment of the goods from the manufacturer or producer to the jobber, and of the less than carload rate on a shipment

from the jobber to the retailer or consumer. The manufacturer or producer can sell to the retailer or consumer only in less than carload lots as a general rule, and in the absence of the forwarding agent must pay the less than carload rate for the transportation of the goods to the retailer or consumer. This advantage in freight rates which the jobber has over the large manu-

facturer enables him to compete with and undersell the latter and preserves for him his business. It seems reasonably certain that if the large manufacturers and producers are able, through the instrumentality of the forwarding agent, to reach retailers and consumers direct at the carload rate, the business of the jobber must be destroyed.

The general operation of the forwarding agent must ultimately increase the cost of goods to the consumer. The cost of goods to the latter is determined, generally speaking, by the cost of production and the transportation charge. The transportation charge, in the absence of the forwarding agent, is such only as to render a fair profit to the railroad company. The operation of the forwarding agent means the intervention of a new factor in the transportation business, the existence of another middleman between the producer and the consumer, who must make his living from the transportation charge. This charge must then be large enough to support both the carrier and the forwarding agent and return a fair profit to each. The result to the consumer must ultimately be higher prices, since he must not only pay the carrier and shipper, but also the forwarding agent.

In all these injuries to the interests of less than carload shippers, jobbers, and consumers, which will flow from the operation of the forwarding agent, the railroad companies are directly concerned. The prosperity of the railroads depends upon the prosperity of their

less than carload shippers, upon the prosperity of the small 205 places along their roads as well as the large cities, upon the development of local industries and preservation of equality among less than carload shippers throughout the country. Any injury to the business of the small shippers, which flows from the operation of forwarding agents, will eventually have its effect upon the business of the railroads.

Not only will the business of the carriers be thus indirectly affected, but a very serious attack upon their revenues will be directly made by the forwarding agent. The latter comes to the railroad company as a competitor, and seeks to obtain the use of the railroad company's equipment for the carrying on of a business, the revenue from which the railroad company would, in the absence of the forwarding agent, receive, but which the forwarding agent diverts from the railroad company to itself. As more fully set forth in the affidavit of Mr. Caldwell herein, the railroad companies have invested large sums of money in their less than carload plants and equipment. If the less than carload business be reduced because of the operation of the forwarding agent, there will still remain enough less than carload business to require the maintenance of the less than carload plants and equipment in substantially their present condition. The falling off in less than carload business can not possibly be met by a reduction in less than carload expenses, and the result must be a marked decrease in the net revenue of the carriers.

The railroad companies must then in some way maintain their present net revenues. Apparently the only way in which this can be

done is by raising the less than carload or carload rates, or both, or by allowing the service to deteriorate. This means of course a readjustment of the relations between the carriers and the shippers
 206 and among the shippers themselves, which have become firmly fixed and adjusted upon the present basis of a differential between the less than carload and the carload rates, and absolute equality among less than carload shippers.

WILLIAM S. JENNEY.

Subscribed and sworn to before me this 29th day of October, 1908.

[SEAL.]

JOSEPH FIELD,
Notary Public, New York County.

207 In the Circuit Court of the United States for the Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, The Wabash Railroad Company, The New York, Chicago and St. Louis Railroad Company, and The Baltimore and Ohio Railroad Company, complainants.
 v.s.

In Equity. October term, 1908. No. .

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, and Edward B. Boise, as trustee in bankruptcy of The Export Shipping Company, defendants.

STATE AND COUNTY OF NEW YORK,
Southern District of New York, ss:

BURNS D. CALDWELL, being duly sworn, deposes and says: I am and have been for 5 years last past vice-president in charge of the traffic department of The Delaware, Lackawanna and Western Railroad Company, one of the complainants herein, and for the last 30 years have been engaged in various capacities in connection with railroad traffic.

Complainants herein are common carriers, engaged in the inter-state transportation of passengers and property through a
 208 large portion of the Official Classification territory, which is the territory of the United States east of the Mississippi River and north of the Ohio and Potomac rivers. The Delaware, Lackawanna and Western Railroad Company's lines extend through the States of New York, Pennsylvania, and New Jersey. The Wabash Railroad Company's lines extend through the States of New York, Michigan, Indiana, Illinois, Missouri, Iowa, Ohio, and Pennsylvania. The New York, Chicago and St. Louis Railroad Company's lines extend through the States of New York, Pennsyl-

vania, Ohio, Indiana, and Illinois. The Baltimore and Ohio Railroad Company's lines extend through the States of New York, Pennsylvania, Delaware, Virginia, West Virginia, Ohio, Indiana, Illinois, Kentucky, Missouri, and the District of Columbia.

The defendant herein, The Export Shipping Company, is a forwarding agent and is engaged in a business which is conducted as follows: The forwarding agent assembles, or causes to be assembled, at a given shipping point several less than carload shipments of freight owned by different persons, firms, or corporations to an amount sufficient to make a carload. It orders a car from the railroad company and loads, or causes to be loaded, into the car the said less than carload shipments. It takes out one bill of lading covering the goods, showing them to be shipped in the name of one consignor, who may be the forwarding agent or one of the several owners, to one consignee. It may receive the goods at point of destination and distribute them to the different consignees entitled thereto, or the several consignees may themselves call for the goods at the railroad station. The forwarding agent seeks to pay the railroad company the carload rate that would apply to a carload of such goods 209 as it may ship if said goods were all owned by one consignor or one consignee. If successful in securing this carload rate, it then divides with the several less than carload shippers the difference between the less than carload and the carload rates applicable to their shipments. The less than carload shippers thereby have their goods transported at rates lower than the published rates of the railroad companies applicable to such shipments, and the forwarding agent makes a substantial profit out of the transaction.

The railroads operating in said Official Classification territory, including the complainants herein, have for a long series of years past, by tariffs duly published and filed with the Interstate Commerce Commission, provided lower freight rates for shipments of nearly all kinds and classes of freight in carload quantities than for shipments of the same articles in less than carload quantities. Not only has this lower rate been applied to carloads made up of one kind or class of freight, but the owners of goods have been given the privilege of combining into a carload, and shipping at a carload rate, freight of all kinds and classes. The freight rate applicable to a mixed carload of freight is the carload rate for the highest class of freight contained in said carload, the minimum weight allowed being that attaching to such rate. The extent to which owners of freight may combine into a carload shipment various classes of freight may be seen from an examination of the Official Classification, a tariff governing all the railroads operating within Official Classification territory. Said Official Classification contains five thousand eight hundred and fifty-two (5,852) less than carload, and four thousand two hundred and thirty-five (4,235) carload ratings. It thus appears that approximately 210 seventy-two per cent. (72%) of all freight shipped in less than carload lots can be combined into carloads by the owners thereof and take the carload rating, regardless of the kind or

nature of the freight. Fully half of the westbound freight consists of less than carload shipments and a large part of the eastbound traffic is of the same character.

Because of the extensive privileges granted by the railroads within Official Classification territory in the way of combining various kinds and classes of freight into carloads, taking carload rates, and because of the great number of less than carload shipments moving through Official Classification territory, large opportunities were, prior to the adoption of the present Rules "5-B" and "note" and "15-E" and "note" of the Official Classification, set forth in the bill of complaint herein, presented to forwarding agents, not connected with the shipment of goods as owners, to collect the less than carload shipments of various owners in a given place to an amount sufficient to fill a car and tender them to the railroad company as a carload shipment, thereby securing for such less than carload shipments a lower rate than they could otherwise be transported for.

As the number of forwarding agents increased under these favorable conditions, their operations were found to have a detrimental effect upon the business and revenue of the railroads, not only by injuring, through various forms of discrimination, a great many of the railroad companies' less than carload patrons, but also by depriving the railroads of a substantial amount of their less than carload business, and by performing many services in respect to such shipments that the railroad companies had equipped themselves, at great expense, to perform.

211 It also appeared that carload shipments of forwarding agents imposed upon the railroad companies liabilities and burdens which did not result from carload shipments of a single ownership.

The railroads of the Official Classification territory, including the complainants herein, several years ago adopted certain rules which are now obtained in the Official Classification and are set forth in the bill of complaint herein, to prevent the shipments of such forwarding agents from moving over their roads at the carload rate. These rules, known as "5-B and note," and "15-E and note," require that all carload shipments of freight, to be entitled to the carload rate, shall be owned either by one consignor or one consignee, thereby preventing the assembling by a forwarding agent of several less than carload shipments of various owners into one lot, and the shipment of the same by the forwarding agent as a carload, at a carload rate.

These rules have been effective to prevent any general operation of forwarding agents within Official Classification territory, but such business has been carried on within that territory by some persons, firms and corporations, to a limited extent, in violation of the rules, because of the failure of the railroad companies to detect the nature of such shipments in all cases. The business is also carried on to a limited extent in the Southern and Western Classification territories, the Southern Classification territory being that east of the Mississippi

River and South of the Ohio and Potomac Rivers, and the Western Classification territory that west of the Mississippi River. In those territories carloads of mixed freight are permitted to take a carload rate only in the case of a very few articles, even for one owner thereof.

An examination of the Southern and Western Classification tariffs shows that the forwarding agent can, in the Southern territory, combine, for the purpose of securing a carload rating, only 22% of the articles having less than carload ratings, and in the Western territory only 29% of such articles, whereas, in the Official Classification territory, as before stated, 72% of such articles can be combined. The field for the operation of the forwarding agent in Southern and Western Classification territories is therefore very small.

From the limited operation of forwarding agents in the Western and Southern Classification territories, as well as in the other Official Classification territory, however, the conditions attending their shipments and their effect upon the business of the railroads can be observed. It is a fact that in the case of carload shipments of one ownership demurrage charges rarely accrue at the point of loading. On the other hand, it has been the experience of the railroads that carload shipments of forwarding agents are generally delayed beyond the free time of forty-eight (48) hours allowed for loading. For this delay of their equipment the charge of one dollar (\$1.00) per day per car is not compensatory to the railroads. The delay, it has been observed, is due partly to the carting of the goods to the car by the various draymen of the several owners, the division of responsibility and lack of proper direction and management, as well as the natural desire of the forwarding agent to hold the car until it has been filled to its capacity. Illustrations of this tendency to delay may be found in the various shipments of The Export Shipping Company, which were disclosed at the hearing before the Interstate Commerce Commission. On the shipment referred to in The Export Shipping Company's complaint against The Wabash Railroad Company and

The Delaware, Lackawanna and Western Railroad Company, five dollars (\$5.00) demurrage accrued at the point of shipment, indicating a detention of the car seven (7) days for loading. On the shipment referred to in the complaint against The New York, Chicago and St. Louis Railroad Company and The Delaware, Lackawanna and Western Railroad Company, five dollars (\$5.00) demurrage accrued, indicating a detention of the car for seven (7) days. On a shipment over The Michigan Southern Railroad, consigned by and to "E. Goldman & Co," through the agency of The Export Shipping Company, June 5, 1907, eleven dollars (\$11.00) demurrage accrued, indicating a detention of the car for thirteen (13) days. On another shipment over the Michigan Southern, consigned by and to E. Goldman & Co., through the agency of The Export Shipping Company, five dollars (\$5.00) demurrage accrued, indicating a detention of the car for seven (7) days.

Experience with forwarding agents has also disclosed that there is a marked tendency with them to falsely bill and classify freight in order to secure lower rates or minimum weights. This has been discovered in the past by our inspectors, and it appears to be more prevalent in the case of carload shipments of forwarding agents than those of a single ownership. Forwarding agents have been attempting to operate throughout Official Classification territory in violation of rules "5-B and note" and "15-E and note," and it has only been by constant inspection that they have been detected and made to pay the legal rates.

By reason of the great freedom allowed within Official Classification territory, in combining for carload shipment, articles of all kinds and description, forwarding agents have in the past, in so far as they have succeeded in operating contrary to the tariffs of the railroad companies, combined articles of widely different character in 214 the same carload. This is not the usual case with single owners of carload shipments. The result of such combinations of different kinds of goods, of light and breakable with heavy and unbreakable articles, has been in the past to increase claims for damage to the freight, often resulting in lawsuits. And I am advised by counsel, that the railroads, in the event of loss or damage to carload shipments of forwarding agents, are subject not only to suits by the forwarding agents, but also to suits in tort by the several actual owners of the freight.

Complainants herein have expended vast sums of money in securing equipment and facilities for properly handling their less than carload business as it has developed to its present proportions. Large and expensive terminals in the cities, freight stations and yards, rolling stock and equipment, transfer platforms, loading and unloading equipment, a considerable part of all of which has no connection with carload shipments, have been provided for the less than carload business. A large laboring and clerical force is required to care for this traffic.

The less than carload rates are based to a large extent on the less than carload expenses. If the expenses are reduced the rates can be reduced, but falling off in less than carload business does not mean a proportionate falling off in the less than carload expenses. A large part of those expenses are constant, having no relation to the amount of less than carload business done. Terminals and freight stations cannot be shrunk, nor the fixed charges for their maintenance diminished to meet the reduction in gross revenues. The same number of trains have to be run, with substantially the same number of cars whether the traffic be light or heavy. Some reduction in expense

can be made by the discharge of a few employees in the clerical 215 and laboring forces, but even the number of employees cannot be reduced in proportion to the falling off in business.

The business of a forwarding agent is profitable and requires little capital. It is now carried on to a considerable extent in West-

ern Classification territory, although the field for the operation of the forwarding agent is there very limited because of the rules in force, prohibiting the mixing in carloads of articles of different classes, and the small number of carload rates there provided. The business had already begun to assume large proportions and to seriously affect the railroad companies' revenues in Official Classification territory several years ago, before the present rules forbidding the practice were adopted. Even now the forwarding agents are attempting to operate to a limited extent within Official Classification territory, in violation of the railroad companies' tariffs. The carriers have, therefore, every reason to believe that if they are required to permit forwarding agents to ship over their roads at the carload rate, a large part of the present less than carload shipments will in the future be handled by forwarding agents and shipped at the carload rate. The carriers' gross revenues will then be greatly reduced. There will still remain, however, a considerable amount of less than carload traffic to be handled by the railroads, which will require them to maintain their less than carload plants and equipment substantially in their present condition. The falling off in less than carload business, therefore, will not be met by a proportionate falling off in expenses and the net revenues of the railroads will show a marked reduction.

The forwarding agent confers no benefits upon the less than carload shippers except in so far as it secures for them rates lower than the carriers' published less than carload rates. In point of speed and safety of carriage, complainants are now providing a less than carload service for shippers that is equal, if not superior, to the carload service provided by the railroads, or to any service that could be secured to less than carload shippers through the operation of the forwarding agent. The Delaware, Lackawanna and Western Railroad Company runs through cars for less than carload traffic from New York to Western territory, by way of its connections west of the Niagara frontier, including the New York, Chicago and St. Louis Railroad Company, the Wabash Railroad Company, the Grand Trunk Railroad Company, the Lake Shore and Michigan Southern Railroad Company, and the Michigan Central Railroad Company, loading such through cars from its New York piers daily with less than carload traffic that is brought to those piers, destined to most intermediate points of any size on its road, and to most of the large cities west of Buffalo in the Central freight territory, including Cleveland, Detroit, Cincinnati, St. Louis, and Chicago. It likewise moves through cars to St. Paul and Minneapolis. It runs similar through cars to Chicago, which are delivered to the transfer platforms of the Western roads, where the freight is transferred by them to through cars which they make up daily, destined to a large number of Western points. In addition to these through cars from the New York piers, the Delaware, Lackawanna and Western Railroad Company handles in the same way traffic from all outlying stations in New York Harbor. It also loads similar cars at transfer

stations at intermediate points on its road, the traffic for which brought to these transfer stations in daily cars from various points on the road and loaded into through cars for Western points. It also has transfer stations at points like Scranton, Binghamton, and Po-

Morris, where freight coming from connecting roads is similarly loaded in through cars to Western points. The Western connections of the Delaware, Lackawanna and Western Railroad Company, including the New York, Chicago and St. Louis Railroad Company and the Wabash Railroad Company, have a similar service on less than carload traffic eastbound, the same coming to the Delaware, Lackawanna and Western Railroad Company in through cars. The time taken for the transportation of less than carload freight from New York City to Chicago or St. Louis in these through cars is sixty (60) hours, and this time is made with substantial regularity. This time is much faster than that for the average movement of carload traffic, which is about five (5) days from New York to Chicago or St. Louis. These through cars are made up daily, and there is substantially no movement of less than carload freight on the lines of the Delaware, Lackawanna and Western Railroad Company, the Wabash Railroad Company, or the New York, Chicago and St. Louis Railroad Company, except local traffic, that does not go through cars. As testified to at the hearing before the Interstate Commerce Commission by Mr. Gallaher, general freight agent of the Baltimore and Ohio Railroad Company, the same through service for less than carload shipments is in force on the Baltimore and Ohio Railroad.

BURNS D. CALDWELL

Subscribed and sworn to before me this 29th day of October, 19-

[SEAL.]

JOSEPH FIELL,

Notary Public, New York County.

[The bill of complaint and exhibits attached thereto, which form part of the motion papers submitted on the application for an injunction pendente lite in this action in the Circuit Court of the United States for the Southern District of New York are here omitted from this record because they are hereinbefore incorporated at side page 7 to 106 incl.]

318 BEFORE THE INTERSTATE COMMERCE COMMISSION.

No. 1228. The Export Shipping Company vs. The Wabash Railroad Company and The Delaware, Lackawanna & Western Railroad Company.

No. 1229. The Export Shipping Company vs. New York, Chicago and St. Louis Railroad Company and Delaware, Lackawanna & Western Railroad Company.

No. 1230. The Export Shipping Company vs. The Baltimore and Ohio Railroad Company.

COUNCIL CHAMBER, CITY HALL,
New York, October 28th, 1907.

Before Hon. Martin A. Knapp, Commissioner.

Appearances: Francis G. Bailey, esq., and Walter J. McCoy, esq., for the Export Shipping Company; William S. Jenney, esq., and Douglas Swift, esq., for the Wabash Railroad Company and the Delaware, Lackawanna & Western Railroad Company; John H. Clarke, esq., for the New York, Chicago & St. Louis Railroad Company; John G. Wilson, esq., for the Baltimore & Ohio Railroad Company.

Commissioner KNAPP. The next case is the Export Shipping Company against the Wabash Railroad Company, and others. There appear to be three of these cases, all of the same general nature, I suppose.

Mr. BAILEY. Any one of which will be sufficient.

320 Commissioner KNAPP. They can all be heard together?

Mr. BAILEY. Yes, sir.

Commissioner KNAPP. Who appears for the complainant, the Export Shipping Company?

Mr. BAILEY. I appear for that company. If this case of the Wabash is the first one on the list, it will be quite sufficient without calling the others.

Commissioner KNAPP. Who appears for the Wabash Railroad Company?

Mr. JENNEY. Mr. Jenney and Mr. Swift.

Commissioner KNAPP. In No. 1229, Mr. Bailey, of course you appear for the complainant in that case?

Mr. BAILEY. In all of them.

Commissioner KNAPP. Who appears for the New York, Chicago & St. Louis Railroad Company?

Mr. CLARKE. I appear for the New York, Chicago & St. Louis Railroad Company.

Commissioner KNAPP. In the case against the Baltimore & Ohio, who appears for the defendant?

Mr. WILSON. I appear.

Commissioner KNAPP. Mr. Bailey, will you briefly state what these cases are about?

21 Mr. BAILEY. Since we made this complaint, information has reached us through Chicago that the Commission already has this matter under advisement and will probably make a ruling therein. If that is the case, it is hardly worth while for us to take these cases up.

Commissioner KNAPP. What is the source of that information?

Mr. BAILEY. Mr. Commissioner Harlan, under date of September 8th, wrote as follows:

"In reply to your letter of September 20th, I beg to advise you that the question of the right of shippers to combine their less than carload shipments into one carload in order to get the benefit of the carload

rate has been the subject of several rulings of the Commission. The matter is, however, under further consideration in connection with inquiries from other parts of the country. And I will advise you of the Commission's conclusion on the whole question in the near future."

If that is the case, it is hardly worth while going through this. The fact merely resolves itself into the interpretation of two lines in the official classification. That is all we are practically interested in.

322 Commissioner KNAPP. I was not personally aware of that correspondence; indeed, I had some conversation with Commissioner Harlan in reference to assigning these cases for hearing here to-day, and no mention was made of the matter.

Mr. BAILEY. This is with the Holly Downgraft Furniture Company of Chicago. However, I will briefly state our position in the case.

Commissioner KNAPP. If you please.

Mr. BAILEY. The case is resolved on the interpretation of Rule 5-B of the Official Classification, that the consignee or consignor of property must be the owner thereof. It has always been the custom in pretty nearly every country we do business in, and we do it in all civilized countries of the world, that a man could make up a carload of merchandise, ship it as a carload and get the carload rate. It was not inquired into whether he was the owner of that property or was not. The Official Classification requires that the owner shall be the shipper or the consignee. The Western Classification does not. The Wabash Railroad runs east from Chicago. We can offer them a car

load of this freight and they will have it inspected and set up 323 the less than carload rate. We acknowledge that our busi-

ness is such as the Wabash Railroad says, we make up consolidated cars of one class of freight, making up the carloads, and allowing the difference between the different shippers. We do the same thing west of Chicago. I have not the knowledge that we do ship over the Wabash, but I know we do ship over the C. B. & Q. carloads of machinery, and the C. B. & Q. is familiar with the fact that the carloads belong to different people and are owing to different concerns at destination, but they make no objection, and in fact encourage us to do business. In Chicago there is a concern called the Furniture Exchange. They have quite an enormous building out there and have track connection with several railroads. Their business is exclusively taking care of shippers of furniture for Denver, Salt Lake, or the Pacific coast, holding it there until they get sufficient to make a carload, and then consigning it in their own name to agents at destination and distributing it there. I have not heard of one railroad company that would turn down those cars of freight. All the companies in Chicago are anxious enough to get our carloads of

freight. There is no question of the shipment coming from 324 Chicago to New York. They will give us the cars and they do not ask us if we are the owners of the property or anything else, and accept us as shippers, and we claim we are entitled, the sam-

as anybody else, to a carload rate. For instance, we have a concern in Berlin, in which orders considerable machinery. They will order a carload in Chicago from half a dozen concerns, and they will advise use of that, and we will order in a car and tell these different shippers to deliver these shipments for this carload, and we will send it in the name of the Export Shipping Company to ourselves in New York, and when it reaches here we will put it on a steamer and ship it abroad as a carload of machinery. The goods are paid for before they leave Chicago, therefore the people who actually deliver it or whose trucks actually deliver the stuff are not the owners; the goods are consigned to us at New York; we are not the owners; we are simply acting as the agents of the consignees in Berlin. Now is or is not that carload entitled to the carload rates from Chicago to New York, it all being machinery?

And the same way with other classes of commodities. For instance, I am informed and have asked these railroad companies to produce their express tariffs—the express company is a shipper over the railroad the same as I am. They will deliver a lot of freight to their cars and the railroad company will transport it as common carriers from Chicago to New York. Do they ask these express companies whether they are the owners of this merchandise that they are transporting down here? Do they admit that they are?

In fact the whole thing that we want a ruling on is, are the railroad companies east of the Mississippi River and north of the Ohio River in Central Freight Association and Trunk Line Association territory, who are governed by the Official Classification, justified in putting their Rule 5-B in the Classification and charging us a higher rate of freight on a carload of freight which we ship, which we do not own, than they are any other shipper?

Commissioner KNAPP. Well, Mr. Bailey, do you contend that under the rule which they have established in the Classification they are not warranted in requiring you to pay less than carload rates on such shipments as you offer?

Mr. BAILEY. Yes, sir.

Commissioner KNAPP. That you have a right to do it under their Classification as it now reads?

326 Mr. BAILEY. That we have a right to do it under their Classification as it now reads.

Commissioner KNAPP. You are not asking to have any change made then in the rule as now found in the Classification?

Mr. BAILEY. I am asking to have a change made in the interpretation of it; in other words that the inspection bureau in Chicago cease to inspect our cars—they can inspect them all they want to, but cease to instruct the railroad companies to charge less than carload rates on these shipments that we put in our cars and ship from our Chicago office to our office in New York.

Commissioner KNAPP. Did I understand you to concede the facts to be as stated in the answers of the several defendants in these cases?

MR. BAILEY. We do. We want to find out whether we are within our right in doing this. If not, we want to stop our business and get out of it. No, pardon me, in one of these answers it is stated that we represented ourselves to be owners of the property. We deny that. We did not.

Commissioner KNAPP. Mr. Jenney, will you make a statement of your position in the matter?

327 MR. JENNEY. I assumed, Mr. Commissioner, that the complainant in this case would introduce some testimony so that we could develop what the real facts are. The fact, as we are informed, and it is the real objection on the part of the carriers to recognizing the Export Shipping Company, is this: The Export Shipping Company will consolidate from various different consignors less than carload shipments of freight and come to the railroad company and bill that freight in the name either of the Export Shipping Company or of one of the consignors, generally in the name of one of the consignors. They won't say anything to the railroad company or its agents to the effect that that is not a shipment which under our Classification rule is entitled only to the less than carload rate, but they go and get the bill of lading as though it were a shipment entitling them to a carload rate, and they will get a bill of lading on a carload rate knowing that that is against our practices, and then if our inspectors discover that the shipment is not owned by the Export Shipping Company, why, they will pay the less than carload rate on it. I presume in a great many instances they have put through their shipments from

various consignors on less than carload freight at a carload
328 rate, and we have not discovered it. Nothing in their business methods enables us to discover it. When we do discover it we make them pay less than carload rates. What they do—of course, the only reason that they are in business is that they give the less than carload shipper a cheaper rate than we can give him—they go to a shipper who has a less than carload shipment, and instead of quoting him the less than carload rate, they quote him a less rate.

For example, here is a letter to one of the Wabash officials as to their practice:

"The rate on machinery less than carloads, Chicago to New York, is 65 cents. The carload rate is 30 cents. In personal conversation with competitors of the Export Shipping Company I am assured it is the practice of these consolidators to assemble less than carload machinery shipments from various parties and forward in their own name as a carload, or attempt to do so, charging the individual shipper 47½ cents, while paying us only 30 cents."

Now, we have a number of instances which could be developed in case they went on the stand to show that that is their purpose; that what they seek to do is to stand as an intermediary between
329 shippers and the railroad company, and be enabled through giving carload rate to manipulate the rate with less than carload shipments, whereby they can give the less than carload shippers a difference between the less than carload rate and the carload rate,

giving one rate perhaps to one shipper and another rate to another shipper, depending upon the necessity of competition in their business.

Now, we strenuously object to any such practice as that, and we do not believe that the Commission are going to interpret anything in our Classification rules which would permit that practice. There are, of course, many other reasons which have been suggested by Mr. Commissioner Prouty, in the Buckeye Buggy Company case, why we should not permit forwarders to do. I think that is all I have to say.

Mr. BAILEY. We say, Mr. Chairman, that we give them a carload of freight. We do exactly the same thing in delivering that carload of freight at Chicago to their terminal that the Sullivan Machinery Company does. They place a car in their yards and we have the freight hauled in there and put in, and they certainly check it

the same as any other shipper. It costs them no more,
330 and they are at no further expense of hauling the shipments
of the Export Shipping Company to New York than if all
that stuff were hauled there by the Sullivan Machinery Company.
In so far as what we get from the shipper, our proportion of the
difference between carload and less than carload rates, we say we per-
form a service for that.

Another thing, if this is an infraction of the interstate-commerce law, it would be an infraction east of the Mississippi River as well as west of the Mississippi River. Do the Wabash Railroad permit consolidated carloads to pass over their rails destined to Denver and the Pacific coast: do they allow it to be done out there on machinery, furniture, or any other commodity, or a mixture of commodities, as might be presented under the Western Classification?

Commissioner KNAPP. My present concern is to ascertain whether we need to make any testimony in this case to see if we have all of the facts for a complete determination of the case.

Mr. BAILEY. We concede all the facts.

331 Commissioner KNAPP. Do you concede the facts as stated
by Mr. Jenney?

Mr. BAILEY. That we make up the less than carloads and charge
the shipper a proportionate rate of the difference between the carload
and less than carload rates.

Mr. JENNEY. Then you concede that you go to various shippers
who have less than carload shipments of freight and contract with
them as their agents to take that freight for less than the tariff rate
of the railroad company on less than carload shipments?

Mr. BAILEY. Yes.

Mr. JENNEY. And you actually quote a rate to them less than the
carload rate?

Mr. BAILEY. We do.

Mr. JENNEY. And in several instances you have shipped as agent
for different consignors less than carload shipments on which you
have obtained a carload rate from the railroad company?

Mr. BAILEY. I do not concede that.

Mr. JENNEY. Have you not done that?

Mr. BAILEY. I do not concede it.

Mr. JENNEY. Well, you do not deny it.

Mr. BAILEY. No.

332 Mr. JENNEY. Those shipments have got through without the inspectors of the railroad company discovering that?

Mr. BAILEY. They may have.

Mr. JENNEY. And in those cases a shipper of less than carload shipment has actually shipped his goods over the lines of the railroad company without paying the tariff rate.

Mr. BAILEY. No.

Mr. JENNEY. That is to say that he has got a less than a less than carload rate on a less than carload shipment.

Mr. BAILEY. Anybody could get it in the same way.

Mr. JENNEY. In such cases—

Mr. BAILEY. If such cases exist I will agree with you that we got less than a less than carload rate. Any shipper could get the same rate.

Commissioner KNAPP. Mr. Bailey, does your complaint here set some up, some specific transaction, or some particular instance?

Mr. BAILEY. Yes, sir.

Commissioner KNAPP. Or does it go to the general custom?

333 Mr. BAILEY. There is a particular instance in each case.

We have taken only one carload in each case, but we have other cases we could call to your attention.

Commissioner KNAPP. The case which you set up was a case where you were denied carload rates?

Mr. BAILEY. Yes, sir.

Commissioner KNAPP. And is the complaint confined to that particular transaction?

Mr. BAILEY. Yes, sir.

Commissioner KNAPP. And in their answer that is admitted, I suppose?

Mr. BAILEY. That they did that; yes, sir.

Mr. WILSON. May I ask you a question about the specific complaint you have made? Do you in this complaint or petition show the ownership of the property shipped?

Mr. BAILEY. Not in our complaint; no, sir. I can furnish you the information.

Mr. WILSON. You do not allege in your complaints that you yourselves are the owners of the property, do you?

Mr. BAILEY. We do not.

Mr. WILSON. On the other hand, you do not state who the owners of the property are.

334 Mr. BAILEY. No.

Mr. WILSON. But you admit that the ownership of the property in no case was in yourselves: I mean, you now admit that. Is that correct?

Mr. BAILEY. Well, there is something further in that. In nearly all of these cars that we ship from Chicago to New York there is

export freight, and that is what we are after primarily, the export movement to foreign countries. Our people in London—our own clients there in London, Paris, Rotterdam, and Berlin—will instruct us to receive shipments of machinery and kindred goods in Chicago, and we would arrange, so far as possible, to get all those shipments in carloads from Chicago to New York, and we would issue through bills of lading from Chicago to New York of our own, and send those goods to the different ports of destination after they arrive in New York, to accomplish these bills of lading. I understand that the railroad companies do precisely the same thing. For instance, Armour & Company have a shipment of six different sorts of canned beef or canned goods, all of one class, in a car. They will load that car, and the railroad company will issue export 335 through bills of lading from Chicago—say, one to London, one to Havre, Rotterdam, Copenhagen, and Berlin—and give them the benefit of the carload rate to New York, lighter the goods from the arriving station to the export steamers, and ship the goods over on those through bills of lading.

Mr. WILSON. Armour & Co. in that case being the owners of the property?

Mr. BAILEY. Exactly so; but it is a contraction to your classification, for the reason that it reads but on one bill of lading shall be issued for one carload of property. In that event you would have five bills of lading for one carload which had the same rate.

Mr. WILSON. Now, let me take the specific case which you have filed against the Baltimore & Ohio, and see what the facts are as to the ownership. In that case there was a Norfolk & Western car shipped from Chicago, which contained 119 packages, in which the first item consisted of 98 kegs of wire can keys; second, 17 boxes of stair rails; and third, 4 bundles of screens.

Mr. BAILEY. Correct.

Mr. WILSON. Did you own any of that property?

336 Mr. BAILEY. As owners we did not. We had through bills of lading issued from Chicago to Colon, Panama, on the 17 bundles, through bills of lading on the 4 packages to Havana, Cuba, and through bills of lading on the 98 packages of can keys from Chicago to London.

Mr. WILSON. The 98 kegs of wire can keys—

Mr. BAILEY. Went to London.

Mr. WILSON. But owned by whom in Chicago?

Mr. BAILEY. I don't know who they were owned by; they were delivered to the car under our instruction by the American Can Key Company.

Mr. WILSON. And they were destined to where, eventually?

Mr. BAILEY. Joseph Alfred Fisher, Steinholm, Warlingham, Surrey, London, England.

Mr. WILSON. So that was a shipment from a manufacturer in Chicago to an owner in London?

Mr. BAILEY. It may be; I don't know whether he was the owner or not.

Mr. WILSON. Now, the seventeen boxes of stair rails, who owned them in Chicago?

Mr. BAILEY. We don't know who owned them; all we can say is who we told to deliver that stuff to the car. We don't know who the owners were.

Mr. WILSON. From whom did you get them?

Mr. BAILEY. Foster Munger & Co.

Mr. WILSON. Who are they?

Mr. BAILEY. I understand they are a planing mill in Chicago.

Mr. WILSON. To whom were they finally delivered?

Mr. BAILEY. We don't know who they were delivered to, but we shipped them to P. Canavaggio, Colon, Panama.

Mr. WILSON. So that was a shipment from a planning mill in Chicago to some receiver in Panama?

Mr. BAILEY. Some receiver, yes.

Q. To whom were the four bundles of screens—now, how did you get them in Chicago, and from whom?

Mr. BAILEY. We had the Contractors' Supply and Equipment Company of Chicago deliver those, and our bill of lading was issued in favor of Perrimelles & Co., Havana, Cuba.

Mr. WILSON. These various people in Chicago sent this freight down to the railroad station, did they, in their own carts and wagons?

337 Mr. BAILEY. They either did that or we arranged to cart it for them.

Mr. WILSON. I do not understand what you mean. You say you issued your own bills of lading; I mean through bills of lading. You did not get through export bills of lading from the railroad company, did you?

Mr. BAILEY. No.

Mr. WILSON. The railroad gave you a local bill of lading between Chicago and New York?

Mr. BAILEY. Yes.

Mr. WILSON. What do you mean by through bills of lading which you issued?

Mr. BAILEY. As forwarding agents we issue bills of lading in Chicago. They are recognized in banking circles and we have our agents at destination to deliver this freight.

Mr. WILSON. Have you got copies of these particular bills of lading?

Mr. BAILEY. No.

Mr. WILSON. Could you make us copies?

Mr. BAILEY. We could. Our bills of lading are entirely similar to the fact freight lines, with which you are probably familiar.

339 Mr. WILSON. We would like to see the particular bills of lading you put on these three shipments.

Mr. BAILEY. I have not any of them with me.

Mr. WILSON. You will furnish them, will you?

Mr. BAILEY. If you wish them; yes, sir.

Mr. WILSON. The note if the Official Classification in Rule 5-B reads as follows:

"Rule 5-B will apply only when the consignor or consignee is the actual owner of the property."

Now, in the case of the Baltimore & Ohio shipments, the railroad bill of lading is a local bill of lading, from Chicago to New York, reading, "from the Export Shipping Company, consignor, to the Export Shipping Company, consignee."

Mr. BAILEY. Yes, sir.

Mr. WILSON. You have stated that in that case you were not the owner of the property. Is that correct?

Mr. BAILEY. Yes, sir.

Mr. WILSON. You, therefore, desire that the rule 5-B be changed so far as this particular shipment is concerned, do you not?

Mr. BAILEY. Yes; the interpretation of it be changed.

340 Mr. WILSON. Can you conceive any reasonable or sensible interpretation of that rule which would not require the I. C. I. rating on this shipment you have mentioned in the case of the Baltimore & Ohio? Are not the words as plain as they can be?

Mr. BAILEY. That we were not the actual owners in the sense of buying or selling it?

Mr. WILSON. Yes.

Mr. BAILEY. But we are the owners so far as being the shippers, so far as the consignees are concerned.

Mr. WILSON. Is it not a fact that before you can recover or succeed in your complaint as against the Baltimore & Ohio, the Commission must rule that the note 5-B must be changed?

Mr. BAILEY. Yes.

Mr. JENNEY. And the same situation exists in reference to the other two complaints.

Mr. BAILEY. What is that?

Mr. JENNEY. I say it is a parallel situation with regard to the other two complaints.

Mr. BAILEY. It is precisely the same.

341 Commissioner KNAPP. Have you asked in your petition that the rule should be changed so as to allow the thing you do not desire to do?

Mr. WILSON. No, I think not; he has not asked it in ours.

Mr. BAILEY. We have asked for a refund of the amount we claim to be overcharge, and have asked for permission—

Mr. JENNEY. Their purport is "that the defendant be required to answer the charges herein, and after the due hearing and investigation, an order be made commanding the defendant to cease and desist from said violations of the act to regulate commerce, and that the defendant be required to refund the excess charges collected, amounting to \$65 with interest, and such other or further order as the Commission may deem necessary."

Mr. BAILEY. We say that we are discriminated against in that we are not permitted to ship a carload of merchandise at carrier rates, and under conditions which are granted to other shippers, which we maintain to be the fact.

342 Mr. WILSON. I understand the complaint against the Baltimore & Ohio is that under our tariff as they at present exist, this complainant was overcharged. There is no allegation as to Rule 5-B or its unreasonableness or no request that Rule 5-B be changed.

Mr. BAILEY. We claim that it is unreasonable and that it is a discrimination against the Export Shipping Company. May I ask if the different railroad companies have produced express tariffs and express agreements with the different express companies, and, if so, that those may be noted in evidence, in case reference may be wanted to them later?

Commissioner KNAPP. At your request I wrote to the Wabash Company, I think, asking that its contract with the express companies be produced here, and received a reply that it would be here.

Mr. BAILEY. One will be sufficient. May I have that noted?

Commissioner KNAPP. Just a moment. Apparently, you have sought to raise the general question by setting up a particular transaction, and claiming that upon the facts shown in that case you have been overcharged and therefore entitled to reparation for the difference between the carload and the less than carload rates; that 343 apparently upon the theory that under the terms of the Classification itself you are entitled to the carload rates. Now, do you contend that under a rule which says that all property must belong either to the consignor or to the consignee in order to entitle the shipper to a carload rate, it allows such method of consolidation through your agency of the property of various consignors going to various consignees and getting the carload rate?

Mr. BAILEY. We claim that an unjust and unreasonable requirement.

Commissioner KNAPP. No, my point is now, do you claim you have a right to do business which you seek to do under that rule in the Classification, or do you claim that the rule itself is unreasonable?

Mr. BAILEY. We claim that the rule itself unreasonable.

Commissioner KNAPP. That you have not alleged in your complaint, apparently.

Mr. BAILEY. In that we are being discriminated against?

Commissioner KNAPP. Well you—

344 Mr. BAILEY. That we are not allowed to ship a carload of freight where the Sullivan Machinery Company is.

Commissioner KNAPP. How do you claim you are discriminated against?

Mr. BAILEY. The Sullivan Machinery Company is a corporation, and the Export Shipping Company is a corporation, and the Sullivan Machinery Company will deliver a carload of machinery by their own trucks or somebody else's trucks to the Wabash and get a carload rate, no matter to whom it is shipped; and the Export Shipping

Company will ship a carload in their own name, and consign it in carload lots and are denied carload rates.

Commissioner KNAPP. Apparently, as you state it, in the one case the consignor is the owner of all the property and sends it to different consignees, but you are not at any time the owners of any of the property.

Mr. BAILEY. Well, is that a reasonable regulation?

Commissioner KNAPP. Well, that I do not know; that is another question. I want to see whether we are here on a complaint that you have been denied a privilege to which you are entitled under their Classification, or whether you are here contending that the rule in the Classification itself is unreasonable, and therefore, ought 345 to be changed so as to give you the privilege. They are somewhat different questions.

Mr. BAILEY. What we want, Mr. Chairman, is to have that rule changed; or, in any event, that we be allowed to ship a carload of property at the same rate as any body else would as shippers. Now, is it fair to make a rule east of Chicago that is not demanded west of Chicago?

Commissioner KNAPP. Well, apparently, Mr. Wilson, Mr. Jenney, Mr. Clarke, the larger question ought to be determined. I assume that the complainant here is not so much concerned about these particular transactions—

Mr. BAILEY. No.

Commissioner KNAPP.—as it is to have the question settled whether it can do business or not.

Mr. BAILEY. If this business is legal, we are going to keep at it; if it is illegal, we want to stop it. If it is illegal east of Chicago, it cannot be very legal west of Chicago, and yet we are permitted and encouraged to do it west of Chicago.

Commissioner KNAPP. Would there be any objection to disposing of the real question which the complainant wants 346 determined without regard to the technical form of the complaint or insufficiency, as you might allege?

Mr. JENNEY. I would suggest that we might confer on that subject right here.

Commissioner KNAPP. Yes; I wish you would, and if you are content to regard the complaint as amended, so that the whole question may be determined, then consider whether you have all the facts in these pleadings, and these admissions this morning, that ought to be taken into account in determining the question, or whether you want to call some witnesses. There seems to be a full representation here of all the parties to these proceedings, and there is time enough to take any testimony that would be needful to present the question fully. It is an important one.

Mr. WILSON. You generally adjourn at half past twelve?

Commissioner KNAPP.

Mr. McCOY. I have just been brought into the case this morning, and I confess I do not know anything about it at all, and naturally

could not, after looking it up for only half an hour, but under the practice of the Commission it is possible to stipulate as to 347 the facts, and I know we should be perfectly willing to get together with the attorneys for the various railroad companies and endeavor to draw up a correct statement of facts which would cover all the various features of the situation and submit those to the Commission. Apparently there is no disagreement about the facts in the matter.

Now, personally I should not want to be held responsible as an attorney for agreeing upon any statement of facts to-day. If it would not be a matter of too great inconvenience to the attorney, I think it ought to stand over, to give us an opportunity to get together in the facts, because all we want, as Mr. Bailey says, is a ruling on that broad proposition as to whether this Rule 5 and the note provide a reasonable regulation of freight business east of the Mississippi and north of the Ohio River. And also, it seems to me there is another question of fact in it, perhaps one or two others. Do the railroad companies do in their business with the express companies exactly what they will not do with us?

348 And also in the case of a shipment like this Armourt shipment of which Mr. Bailey speaks, should Armour & Company be allowed, notwithstanding some rule in the classification of the railroad company—should they be allowed to ship under five or six bills of lading a consignment of goods which are to go to five or six different consignees in Europe when the rule is, if Mr. Bailey informs me rightly, that there should be but one bill of lading under those circumstances? We are not concerned with the freight business between here and Chicago, or rather between Chicago, for instance, and New York, but it is the export end of this business that we want to be in, and we want to be put in a position where we can do that export business just as well as anybody else can do it.

Now there are a lot of facts which have not been brought out here which could be brought out if we took the testimony, and that would be a very expensive and protracted proceeding, and if everybody admits them there is no need of going into that expense, and later on we might agree to submit a statement in that way.

Mr. JENNEY. Simply speaking for myself, I should object to attempting to get together with counsel and attempting to agree 349 upon any statement of facts, but I would be very glad to confer with the other lines and see if we can agree to determining this question this afternoon, and then I would be very glad to make any admissions on the record that I may see fit, that they ask us to admit, and which are true, but it might be that we might conclude to ask Mr. Bailey a little further as to his method of business.

Commissioner KNAPP. I do not think that is necessary, Mr. McCoy.

Mr. MCCOY. It was only a suggestion.

Commissioner KNAPP. Apparently there is very little in dispute or undisclosed already, taking the complaints and answers and the

statements which have been made this morning; but if the matter is to be considered in its broader aspect you should both be desirous that all the facts appear that the Commission ought to take into account in determining the question.

Mr. WILSON. Would it not, perhaps, be necessary to have all the carriers present when the broad general question is to be taken up? It is a matter, of course, which involves all the carriers in the Official Classification territory.

Commissioner KNAPP. That is not necessary, Mr. Wilson.

Mr. WILSON. Not necessary, I understand, but perhaps it
350 would be better.

Mr. BAILEY. We have not any complaint against the rest of them.

Commissioner KNAPP. It occurred to me that it is hardly worth while to take the time of the parties and the counsel and the Commission to examine the fact of a particular transaction, and then simply determine whether that was allowed or not allowed under the present terms of the rules in the Classification. Apparently you want to act as the agent for two or more consignors or forwarders of less than carload shipments going to different consignees and by assembling a carload quantity, ship it together in one car, and get a carload rate. Now, apparently that is not allowed by the rules of the Official Classification, because those rules appear to require that either the consignor or the consignee must be the owner of all that property—that is, there must be but one actual consignor or one actual consignee in order to entitle a traffic to the carload rate. Now, apparently where that is not the case the shipment is not entitled to the carload rate, and if in the case of the Baltimore & Ohio that turns out to be the nature of the particular transaction you would

351 apparently not be entitled to any reparation on your present complaint, which does not in terms ask to have the rule changed as unreasonable in itself. So I have suggested to counsel here whether it is worth while to litigate the question as to whether this particular transaction was allowable under the present terms of the Classification or whether we should not take up the broader question whether the Classification should be so changed, if necessary, as to permit the business which these gentlemen desire to do—if it is not to be changed, then let there be a distinct ruling, so that they know they cannot go on in that business without violating the law.

Mr. BAILEY. In that event we could not do it west of the Mississippi any more than we could east.

Commissioner KNAPP. That does not necessarily follow, because one of the particular facts in this case is to show what may be done and what it is intended shall be permitted in Official Classification territory and not what is done or intended to be permitted in other territories where conditions may be very different. The only ques-

tion you have here is where there are two or more owners or shippers of less than carload property they may be allowed, either in their own names or through the medium of an agency like yours, to con-
352 solidate their separate shipments and get the benefit of a carload rate. That is the real question you want to have considered?

Mr. BAILEY. That is one question, and there is another thing. As you say, we are interested in the export business. A shipper in Cincinnati would deliver to the railroad company a carload of freight all for New York. There might be just one shipment in that car which would be for export. The agent of the Baltimore & Ohio at Cincinnati would issue a bill of lading consigning that car to New York and the agent of the Continental Line in Cincinnati would issue a through export bill of lading maybe from Cincinnati to Paris on 50 bundles that might be in the car, giving him the carload rate up to New York. That is practically what we would call less than carload shipments in that case. Even if a man is the owner, there are two bills of lading out in effect against that one car of property. If the railroad company do not issue those through bills of lading in the way, giving the carload rate up to New York, we would be on the same footing with them to solicit that business and get our profit as the railroad companies would themselves. We could go to the man and probably give him inducements whereby he would ship these

50 bundles through us as a less than carload proposition to
353 New York and on the ocean rate beyond.

Commissioner KNAPP. That is on the theory you could give him a less ocean rate than he would otherwise be obliged to pay?

Mr. BAILEY. And less in Europe, for the reason we are allowed to consolidate cars there. They want us to consolidate cars. Every time we get an opportunity to consolidate a car from Hamburg to Berlin the railroads are only too glad to allow us and furnish cars of 5,000 kilos, 10,000 or 20,000. But we can not operate against the railroads if they refuse to furnish us through bills of lading; we might as well get out of business.

Commissioner KNAPP. Then, to repeat, I suggest the counsel for the defendants confer as to whether they would not consent to let the general question be determined in this case irrespective somewhat of the serious objection which might be raised in the allegations in these particular complaints, and if so, what further proof they want to have appear on the record, or either side desires to have appear on the record, in order that the full question may be ready for submission.

Mr. JENNEY. May we take it up at 2 o'clock?
354 Commissioner KNAPP. If it is agreeable to both sides, we will take a recess until 2 o'clock, when I will hear you further in this matter.

At 12.30 p. m. adjourned to 2 p. m.

2 P. M.

Commissioner KNAPP. Now, Mr. Jenney, have you consulted about the questions suggested this morning?

Mr. JENNEY. At the suggestion of the chairman, I think that the defendants are willing to permit the complainant to amend his complaint by setting up the particular question asked the Commission to determine here, and we suggest that either the complainant or the defendant be at liberty to introduce any facts in addition to what was disclosed this morning, either by way of testimony or by way of concessions from the other side which will make a record here from which the Commission may determine the broad question.

Commissioner KNAPP. Very well; the complaint in each of these cases will be regarded as amended so as to challenge the reasonableness of the rule now in force in the Official Classification of tariffs, as well as to demand reparation on account of the particular transactions set up in the several cases, and, as far as necessary, the answers will be deemed amended accordingly. Now, Mr. Bailey, are there any other facts which you want to have appear in the

356 record?

Mr. BAILEY. I would like to have a copy of the express contract between the Wabash Railroad and the express companies that operate over its lines offered in evidence and marked for identification.

Mr. JENNEY. So far as that is concerned, Mr. Commissioner, I have got the contract here, the only contract that they have with the express company, but I desire to object to the admission of the testimony or of the contract, on the ground that it is immaterial and irrelevant to the issue here. In other words, I do not care to give any particular publicity to it unless there is some particular ground upon which it is pertinent to this issue. I would like to have the complainant suggest in what particular it is pertinent, before it is received in evidence.

Commissioner KNAPP. What do you say to that, Mr. Bailey?

Mr. BAILEY. I wish to show by this contract that the requirement of other shippers of being the owners of the property is not justified, inasmuch as the railroad companies will transport for the express companies, but they will not transport property for other people—

357 send merchandise, and they do not require the express companies to be the owners of that merchandise, although it may be shipped or consigned to themselves. Further than that, the rates from Chicago to New York by express is \$2.50 per hundred pounds, on shipments for export on which the express companies issue their bills of lading in Chicago, for instance, to Hamburg, they will transport property at \$1.50 per hundred pounds.

Commissioner KNAPP. That question is not presented here by anything in your complaint?

Mr. BAILEY. Which?

Commissioner KNAPP. The difference between their domestic and their export rates.

Mr. BAILEY. That is not presented here. I merely brought that in. I don't know that it is pertinent.

Commissioner KNAPP. Now, is it your contention that in the carrying of traffic by express there is a difference between carload and less than carload rates, and that a forwarding agency like your own may combine less than carload shipments and ship them by express and get a carload rate?

Mr. BAILEY. No; that is not what I wish to bring out; it is 358 that the express companies are allowed to make up carloads of freight to be transported from Chicago to New York or Chicago to the Pacific Coast or other points—

Commissioner KNAPP. Do you understand that in carrying express traffic that there is a difference between carload and less than carload rates?

Mr. BAILEY. No.

Commissioner KNAPP. Then how is it material? Your complaint here seems to be based upon the fact that in carrying traffic by railroad there is a difference between carload and less than carload rates, and you want the privilege of combining less than carload shipments and getting carload rates.

Mr. BAILEY. I say they will not let us ship a carload to New York at carload rates, because of the reason that we are not the owners of the property. I say they will let an express company make up a carload, and under their contract with the express company give them a special rate from Chicago to New York, which we ourselves would not be permitted to have.

Commissioner KNAPP. Shipped by express?

Mr. BAILEY. Through the Wabash Railroad or through the railroad company; yes, sir.

359 Commissioner KNAPP. Shipped by express?

Mr. BAILEY. I would not call it by express. I would say shipped by that company. If we shipped by express we would have to go to the United States Express Company or the American Express Company, or the Adams. I say if we go to the railroad companies and offer this same freight we would not be permitted to get the same rates as the express companies, the express company being a corporation, and we occupying the same position.

Mr. JENNEY. There is nothing in the express contract on that subject. Mr. Ives is here and perfectly willing to answer any questions, and we are perfectly willing to call him.

Mr. BAILEY. Your expressman?

Mr. JENNEY. No; general traffic manager.

Commissioner KNAPP. The general traffic manager is here and you may interrogate him.

360 D. O. IVES, being duly sworn, testified as follows:

Comr. KNAPP. You are the traffic manager of the Wabash Railroad?

Mr. IVES. Yes, sir.

Mr. BAILEY. You are familiar with the contract between the express companies that operate over your rails and the Wabash Railroad?

Mr. BAILEY. I have read it through, and in a general way am familiar; I have not read it lately and am not prepared to repeat its terms exactly.

Mr. BAILEY. Could you state in a general way what proportion of revenue the Wabash would receive on a car of express matter from Chicago to New York, as compared with the amount which they would receive on a carload of first-class freight?

Mr. IVES. We have no carload arrangement with the Pacific Express Company. They do not act as forwarders; they simply handle business under their express contracts and make their own rates, which they publish, and which are on file with the Commission; and the amount of money which the Wabash gets, I should judge, 61 is a question of private contract between them and the Pacific Express Company. That contract is, I think, on file with the Commission, and if it is not we are perfectly willing to file it.

Comr. KNAPP. Apparently the division between the express company and the railroad company is of no consequence to you. What the public is charged may be; and you are asking him for the difference between the express rates Chicago to New York and first-class rates.

Mr. BAILEY. Does the Wabash Railroad Company charge the express company a certain rate per car for transporting its freight?

Mr. IVES. No, no.

Mr. BAILEY. Would you object to stating how the arrangement for traffic is arranged between the express company and the railroad company?

Mr. IVES. I think it is a matter not germane to this case and I would rather not disclose publicly those arrangements, although there is absolutely nothing secret about them. If it is to be pertinent and competent, I am perfectly willing to say as well as I recollect.

Comr. KNAPP. Is it on a basis of division between the express company and the railroad company, of the charge which the express company makes to the public?

Mr. IVES. We get a certain percentage, which I think is common with all express contracts, all arranged with regard to certain minimums and maximums. It has not the slightest effect on the charge the public gets.

Mr. BAILEY. It has no effect?

Mr. IVES. Absolutely none.

Mr. BAILEY. You do not receive a fixed proportion, percentage of their charge?

Mr. IVES. Yes; not of their charges but of their total revenue.

Mr. BAILEY. On that particular line?

Mr. IVES. On the particular line.

Mr. BAILEY. On the particular line over which this freight is moved?

Mr. IVES. The Pacific Express Company operates over the Wabash road, and other roads, no other express company does.

Mr. BAILEY. The charges that you would receive from the Pacific Express Company, from Chicago to New York, on express matters and charges that would accrue between Chicago and Omaha, would not enter into that, would it?

Mr. IVES. No.

363 **Mr. BAILEY.** You would receive a fixed revenue from Chicago up to Buffalo on that charge?

Mr. IVES. As I have stated before, if this is considered competent, I will endeavor to answer to the best of my ability.

Comr. KNAPP. At present you need not disclose what the percentage of division is, but the basis of the arrangement with the express company may perhaps be shown.

Mr. IVES. We pay no attention to their rates. I do not know what their rates are, except as any shipper or individual may. We keep no file of their rates. I pay no attention to their rates and know no more what their rates are than I know what Mr. Bailey charges his customers.

Comr. KNAPP. Your question, Mr. Bailey, assumes that the express company is a shipper?

Mr. BAILEY. Yes, sir.

Comr. KNAPP. The express company is a carrier—so recognized in the law. The act to regulate commerce, as amended, extends this privilege to express companies.

Mr. BAILEY. They would therefore not come within the catalogue of shippers under the law?

364 **Comr. KNAPP.** Apparently not. They are not shippers of merchandise in the sense that that term is commonly used.

Mr. BAILEY. They actually do ship merchandise.

Comr. KNAPP. They actually carry it, not ship it. They are common carriers by express.

Mr. BAILEY. That would make us common carriers by freight?

Comr. KNAPP. No; you are shippers.

Mr. BAILEY. We perform exactly the same services that the express companies do.

Comr. KNAPP. I should not be prepared to admit that proposition, Mr. Bailey. You are under no obligation to publish a tariff of what you charge as to a car or from Chicago or to New York; you have no agencies for transportation, you have no cars, no tracks, no motive power.

Mr. BAILEY. The express companies are pretty nearly in the same condition, except so far as their cars are concerned.

Comr. KNAPP. They hold themselves up to the public as carriers.

365 **Mr. BAILEY** (to Mr. Ives). Do you know if a concern, say Armour & Co., in Chicago, would be allowed to load a carload of one class of material or merchandise, send it to New York

as a carload, and against that merchandise several export through bills of lading would be issued?

Mr. JENNEY. That I object to as not material and not pertinent to this issue. It seems to me that the only question here is as to whether the rules in our classification are proper; that is, with respect to the differentiation between a forwarding agent and an owner. It does not seem to be relevant or competent, or pertinent as to this particular question.

Comr. KNAPP. You are perhaps right about that, Mr. Jenney. Still, it might be of some consequence to know whether, under your rules, a single owner or consignor can ship in carload quantities property that is destined to different persons and get as many bills of lading as there are consignees.

Mr. JENNEY. If the Commission wants that, of course we will give you the facts about it.

Comr. KNAPP. Yes.

Mr. JENNEY. What are the facts about that?

Comr. KNAPP. I think you may state what the fact is in that regard.

366 Mr. IVES. When property of that kind is offered, say, by one shipper, we do, in case of shipments to the order of that shipper at various ports in Europe, issue more than one bill of lading on a shipment that takes a carload rate.

Comr. KNAPP. Is that confined to export traffic?

Mr. IVES. That is confined to export traffic; yes, sir.

Comr. KNAPP. You would not ship for Armour & Co. or any other dealer any property in carload quantity and at carload rates and give different freight receipts or different bills of lading?

Mr. IVES. No, sir. Our tariff provides only for export shipments.

Mr. BAILEY. Would you allow, Mr. Ives, that Armour would load a car to New York, two-thirds of the car for domestic delivery and one-third for export—would you issue a through bill of lading?

Mr. IVES. No; we have no tariff of that kind—would not do it.

Mr. BAILEY. Would not issue it?

367 Mr. IVES. I think not. I am very sure. No; I don't see how we could. Of course I have not prepared myself on all these questions, but I am very positive that such is not the fact and the thing could not be done.

Mr. BAILEY. Are you familiar with handling oriental traffic, westbound to the Pacific coast?

Mr. IVES. No, I am not; we handle some of it, but I am not familiar with it.

Mr. WILSON. I do not think that is material; that is not in the Official Classification.

Mr. IVES. No.

Mr. BAILEY. It would be pertinent to show whether or not a rule that is not asked for westbound should be reasonable eastbound?

Commissioner KNAPP. Yes; I think you may show what is allowed to be done in this regard in Western Classification.

Mr. BAILEY. Do you know if two or more shippers are allowed in Chicago to make up a carload of oriental freight and have separate bills of lading issued for each lot?

Mr. IVES. No; I do not. I could not answer.

Mr. BAILEY. Do you know what is commonly known as "forwarding agents" are permitted to make up mixed carloads from Chicago to western points of machinery and furniture?

368 **Mr. IVES.** Well, I was present at a conference once when I was with the Burlington between the Burlington and Union Pacific, at which the question was brought up, and the decision was reached that under the peculiar conditions existing in the West that that was a desirable thing to do, and it is done.

Mr. JENNEY. Why is that?

Mr. IVES. Because in the first place there were a great many less than carload lots of household goods, including a good deal of junk and undesirable freight—freight very difficult to handle in less than carload a long distance, and it was thought to the interest of the carriers as well as of the shippers of this kind of freight to handle them in carloads on account of their peculiar character; and further, the railroads desired to build up the country and to make it easy in every way for such articles as household goods and furniture and agricultural improvements to be shipped. That was some years ago, and much in vogue on the western lines on a very much smaller list of articles, because, as you yourself said this morning, the traffic conditions in the West are very different from in the East and the Classification does not provide for these mixtures.

369 **Comr. KNAPP.** What may be done in the Western Classification territory in this regard appears in the Western Classification, I suppose?

Mr. IVES. No, sir; it appears more in the tariffs.

Comr. KNAPP. Or in the tariff?

Mr. IVES. It does appear in the two together, but not to the extent that it does in the Official. This mixture is allowed by a general rule in the Official Classification in the West, or such rule existed and such mixtures are made by naming the specific commodities and grouping them either in a classification or territory.

Comr. KNAPP. To my mind, Mr. Ives, there is a very material difference between consolidating different articles owned by the same shippers so as to get a carload quantity and taking a carload of freight and assembling different quantities of the same article owned by different persons in order to get a carload and a carload rate. Now, can the latter be done in the Western Classification territory?

370 **Mr. IVES.** Yes; that practice I speak of refers to shipments owned by different parties, and it has been discussed many times in the West to adopt a similar rule to that in the East, and there has always been roads in the West who objected to it.

Commissioner KNAPP. Whatever may be done in that respect appears either in the Western Classification or the tariff of the roads operating in that territory, or in both?

Mr. IVES. It appears by implication; that is to say, there is no prohibition.

Mr. BAILEY. That is to say, there is no rule similar to this 5-B, which says that the shipper or consignee must be the owner?

Mr. IVES. No.

Mr. BAILEY. Do you know of a concern, corporation, or company called the Pacific Machinery Dealers' Association—the Pacific Coast Machinery Dealers' Association?

Mr. IVES. I know of it.

Mr. BAILEY. Are you familiar with the methods by which they get their machinery shipped from the East?

Mr. IVES. No; I am not.

371 Mr. BAILEY. I suppose you know those shipments are not moving over your line?

Mr. IVES. Well, I really don't know whether they are or not.

Mr. BAILEY. There has been no particular arrangement made with you?

Mr. IVES. No; I know of no arrangements being made.

Mr. BAILEY. Now, is there any additional expense attached to the shipment of a carload of freight for the Export Shipping Company at Chicago and consigned to the Export Shipping Company in New York, as against a shipment made by Allis-Chalmers Company at Chicago?

Mr. IVES. I should say not in that particular instance. It might lead to other shipments.

Mr. BAILEY. In other words, it would not cost you any more to haul a carload of freight that would be delivered you by the Export Shipping Company at Chicago to New York than it would be a carload of anybody else's machinery?

Mr. IVES. That would depend, Mr. Bailey, on whether the various teamsters who are employed by those various shippers all deliver 372 the goods with the same promptness and understood their business as thoroughly as the teamsters of one concern all hauling it at one time.

Mr. BAILEY. If, for instance, the Allis-Chalmers people did not deliver all the carload of freight in one working day or two working days, as the terms may be, you would charge them demurrage for any time they held the car over?

Mr. IVES. We would charge them demurrage.

Mr. BAILEY. You would charge the Export Shipping Company exactly the same way—in other words, you would get the same revenue in both cases?

Mr. IVES. Yes.

Mr. BAILEY. Then the rule would not be any different in the case of the Wabash Railroad Company of transporting one car of freight as against any other similar car?

Mr. IVES. There is a distinction in the time short of the time which requires demurrage to be paid between promptness of delivery. A carload, for example, delivered in two hours would be more desirable

for us than would be one which ran up to within five minutes of the time when we began to charge your demurrage. I do not say
373 that you do or do not deliver your goods promptly, but I can well understand that where you pick up goods from four or five or twenty different shippers—where in your case they might be delivered promptly, but in any business like that one I can well understand that where that practice being general there would be a great deal of teaming by teamsters who are more or less irresponsible and slow, and that that stuff to us from a large number of people would not be handled in as expeditious and as desirable a way as it would when we have one large shipper, or a small shipper delivering a carload of articles from one place.

Mr. BAILEY. So far as you know, any shipments that the Export Shipping Company may have delivered to the Wabash Railroad Company in Chicago, were delivered in a fairly satisfactory way?

Mr. IVES. I have heard no complaints. It is not in my particular line of business to hear such a complaint. They are handled usually by the local people and settled without reference to me unless they are very bad. I have heard of none.

Mr. JENNEY. With reference to the shipment that Mr.
374 Bailey called your attention to, and where more than one bill of lading was issued, that is covered by the exception in the tariff?

Mr. IVES. Yes.

Mr. JENNEY. Have you got that with you?

Mr. IVES. I have a transcript.

Mr. JENNEY. Suppose you read that in evidence.

Mr. IVES (reading): "Extract from Wabash 38500-B H.

"464. Export provisions: When export shipments of provisions are covered by through foreign bills of lading, or are consigned to the care of one foreign freight agent at the Atlantic seaboard, and are shipped under the conditions of Rule 3-A of the Official Classification, through one port of export, more than one bill of lading may be issued for separate lots at the carload rate, provided, however that this privilege shall not apply on any tariff destined to any coastwise points in the United States or Canada, which can be reached by one or more all-rail routes from original points of shipment. (J. C. Cir. No. 1454.) Effective January 9th, 1907."

375 Then we have a similar one on all export shipments issued later; that is, without describing the class.

Commissioner KNAPP. Is the one you have read just now in force?

Mr. IVES. Yes.

Commissioner KNAPP. How is it modified by the subsequent one, if at all?

Mr. IVES. It reads "Export provisions," the first one.

Mr. BAILEY. And the other covers all classes of freight?

Mr. IVES. Yes.

Mr. BAILEY. In other words, that practically gives the shipper in Chicago a carload rate up to New York on less than carload ship-

ments, one for London, one for Hamburg, one for Glasgow, one for Copenhagen—is that true?

Mr. Ives. It gives the privileges that are worded better than I could word them in that circular. I can arrange to have a copy of that given you if you have not it. It depends upon whether you want to call it less than the carload lots or not.

376 Commissioner KNAPP. That would appear to be the fact; as I understand the rule, a person shipping to different consignees abroad may ship in carload lots at carload rates and have separate bills of lading to different consignees. There is no such rule or privilege in respect of domestic shipments?

Mr. Ives. No, sir.

Commissioner KNAPP. Do other roads from Chicago, or operating in the official classification territory, have a similar rule?

Mr. Ives. Oh, yes; that is in effect by all roads.

Mr. JENNEY. I may ask in that connection whether that exception or that privilege which you extend for shipment is something of recent origin?

Mr. Ives. No, sir. No; it has been in effect for I could not tell you how long.

Mr. JENNEY. Do you know whether it was the result of competition?

377 Mr. Ives. Oh, yes; the result of competition on export shipments.

Mr. JENNEY. Something was said about the manner in which the Export Shipping Company delivered the freight. I desire to call your attention to the shipments involved in this case, one of which you will see there \$5.00 accrued car service.

Mr. Ives. Yes.

Mr. JENNEY. Well, the fact is—Mr. Bailey can contradict me if it is not true—the other shipment in which the Lackawanna is interested here is \$11.00 car service.

Mr. BAILEY. What car is that?

Mr. Ives. In other words, Mr. Chairman, if I may be permitted to amend my former reply to Mr. Bailey, I should have added not only was a delay in the car-service time undesirable, but the \$1.00 does not pay us for the use of the car.

Commissioner KNAPP. Would that mean if you sent a car to be loaded for this complainant with traffic coming from different consignors handled through this agency, if only part of that loading was put in before the free time expired, you would charge demurrage until the carload was completed?

Mr. Ives. Yes. That \$5.00 would mean the car had been held 378 there seven days, on which our revenue out of the car would be 70 cents a day.

Mr. JENNEY. That first car that I read, the Wabash, was car 41702. Now, I have got the other car, which was over the Nickel Plate, 10534, on which there was also \$5.00 accrued service. Then I have here the shipment over the Michigan Southern, to the name of E. Goldman &

Company, June 5th, 1907, Lake Erie & Western car No. 11045, upon which there was \$11.00 car service. Lake Shore, 10534, E. Goldman & Company, \$5.00 accrued car service.

Mr. BAILEY. Is that one of those cars mentioned in the complaint?

Mr. JENNEY. The first two are, yes.

Commissioner KNAPP. I suppose, Mr. Ives, that might occur in the case of Mr. Armour or any other shipper of his own property or property sold by him to different consignees; you set a car for him and he might put in part of the load within the free time and then hold the car until the load *are* completed, and charged demurrage?

Mr. IVES. Might be; but it is much less likely to happen with a shipper in that regular business.

Commissioner KNAPP. I understand your argument would be that in case of such shipments as this complainant desires to make 379 there would be a greater possibility of exceeding the free time than in the case of actual carload shippers.

Mr. BAILEY. As a rule, are cars loaded in two days? Loaded with machinery?

Mr. IVES. I have not the statistics, and I should hate to make a guess. I really could not tell you.

Mr. BAILEY. It is not an uncommon occurrence to have shipments from various consignors delayed, and demurrage accrue on them before the cars are shipped—that is not unusual?

Mr. IVES. Oh, no; it is not an uncommon thing. It is much more common on this class of business I am advised by our agents.

Mr. BAILEY. You have statistics, then, indicating shipments besides these of your own?

Mr. IVES. Statistics? Well, they can be easily compiled. I don't think we make such statistics as that; we would simply have to begin now and keep them. We do not keep an itemized account of the demurrage charge other than that which is made by the Car Service Association. The way they keep their statistics—whether the shippers names—they must be given because they collect money from them.

Mr. BAILEY. You stated a moment ago your agents reported 380 there more delays to cars loaded in this manner than other cars?

Mr. IVES. I won't say the export company. There has been a great deal of complaint about the delays in dealing with irresponsible teamsters in some cases on this consolidated—not of your company in particular.

Commissioner KNAPP. The point is, as I understand it, that where this practice is allowed there is a much longer time taken to load the cars, as a matter of actual experience, and that is urged or suggested as a reason for not adopting a rule such as this complainant desires, or one of the reasons.

Mr. IVES. In other words, I did not mean to attempt to argue from the witness chair. I thought the note under Rule 5-B was on file, and was attempting to give some of the reasons for its formulation.

Commissioner KNAPP. That is right. Just as the matter now stands, Mr. Bailey, you are virtually asking that this rule be changed so that you will be permitted to ship as you desire, and it is suggested as one of the objections that it is a matter of actual experience, and very much more time would be taken to load a car than is now taken by those who are allowed carload rates, and that the demurrage which is collected in such cases is not compensation to the carrier for the detention of the car. That I understand to be your position?

Mr. JENNEY. Yes, sir.

Mr. BAILEY. It seems this demurrage is the usual charge made to every shipper.

Commissioner KNAPP. Oh, yes; and obviously, for any shipper who chooses to do so could take an indefinite time to load a car and pay demurrage. Any further question you want to ask now? That is all for the present, Mr. Ives. Anything further you wish to show, Mr. Bailey?

Mr. BAILEY. I see Mr. Gallaher here. I would like to ask him a few questions.

382 T. W. GALLAHER, being duly sworn, testified as follows:

Commissioner KNAPP. You are the general freight agent of the Baltimore & Ohio Railroad?

Mr. GALLAHER. I am; yes, sir.

Mr. BAILEY. Are you familiar with the situation as regards machinery shipments from Cincinnati?

Mr. GALLAHER. No, sir.

Mr. BAILEY. Don't know anything about it?

Mr. GALLAHER. No, sir.

Mr. BAILEY. Do you know anything about the business with the Pacific Coast Machinery Dealers Association?

Mr. GALLAHER. No, sir.

Mr. WILSON. Your jurisdiction does not extend to Cincinnati.

Mr. GALLAHER. Our jurisdiction is east of the Ohio River.

Mr. BAILEY. Who has the jurisdiction in Cincinnati or west of the Ohio River—you?

Mr. GALLAHER. I have no jurisdiction over it, and I am not familiar with the situation in that particular locality.

383 Mr. WILSON. Mr. Gallaher has a separate road with a separate general freight agent that reaches Cincinnati, namely, the Baltimore & Ohio Northwestern.

Mr. GALLAHER. Yes, sir.

Commissioner KNAPP. Any further questions you want to ask Mr. Gallaher?

Mr. BAILEY. That is all, Mr. Chairman, that I have to show.

Mr. JENNEY. Before the complainant closes the case, I would like to have Mr. Bailey go on the stand.

Commissioner KNAPP. Very well; Mr. Bailey you may be sworn.

384 F. G. BAILEY, being duly sworn, testified as follows:

Mr. JENNEY. You are the president of the Export Shipping Company?

Mr. BAILEY. Yes, sir.

Mr. JENNEY. Is it a corporation?

Mr. BAILEY. Yes, sir.

Mr. JENNEY. Organized under the laws of what State?

Mr. BAILEY. New Jersey.

Mr. JENNEY. And you have been engaged in business in the United States how long?

Mr. BAILEY. This company—since 1899.

Mr. JENNEY. You have offices where?

Mr. BAILEY. Chicago and New York, in this country.

Mr. JENNEY. Your office in New York is where?

Mr. BAILEY. 11 Broadway.

Mr. JENNEY. And in Chicago is where?

Mr. BAILEY. 185 Dearborn street.

Mr. JENNEY. What is the business which you are incorporated to do?

Mr. BAILEY. Act as forwarding agent, custom-house broker, 385 buying and selling real estate, vessels, and engaged in a number of things that I can not just remember. It is rather a broad charter, I believe.

Mr. JENNEY. And what you are seeking in this proceeding is to obtain the legal right to do business as forwarding agent throughout the United States, whereby you or your company can assemble a carload of freight and ship it as owners—is that right?

Mr. BAILEY. Not necessarily; no.

Mr. JENNEY. Well, ship it on a carload rate?

Mr. BAILEY. We do.

Mr. JENNEY. How long have you been engaged, Mr. Bailey, or your company been engaged, in soliciting the freight business in the United States, by rail?

Mr. BAILEY. Ever since before we were incorporated—that is since the company was started, in 1899.

Mr. JENNEY. Have you been engaged in shipping as agent for various different consignors or consignees, carload freight, for some years past, over railroad in trunk-line territory?

Mr. BAILEY. I can not recall that we have, no particular set of clients we have been doing that for.

Mr. JENNEY. Have you been engaged in the business for 386 some years past?

Mr. BAILEY. Yes.

Mr. JENNEY. Now, in that business where have you made your money?

Mr. BAILEY. Shall I answer?

Commissioner KNAPP. Yes.

Mr. JENNEY. I mean what is the consideration from which you make your money?

Mr. BAILEY. We have the carloads transported at carload rates, and we make our arrangements with the shipper or the consignee as to the proportion that he shall pay for transporting a particular lot of freight that he occupies in the car.

Mr. JENNEY. Then you ship your car at a carload rate and you divide with the shippers the difference between the carload rate and the less than carload rate which they would have to pay if they did not ship through you, and in that way you make your money; is that right?

Mr. BAILEY. We divide it under an agreement between ourselves, yes.

Mr. JENNEY. And, of course, depending upon competitive reasons, Mr. Bailey, one of your customers may ship for less than another?

387 Mr. BAILEY. It is possible.

Mr. JENNEY. For example, I read before Mr. Commissioner Knapp this morning a letter reciting that the rate on machinery, I think, from Chicago to New York was 65 cents in less than carload shipments, whereas in carload shipments the rate is 30 cents. Now, you have in the past assembled from different shippers less than a carload amount of machinery and shipped it, paying a carload rate, have you not?

Mr. BAILEY. Our company has.

Mr. JENNEY. And in that case you have quoted to the shipper a rate of 47½ cents?

Mr. BAILEY. That I have no knowledge of.

Commissioner KNAPP. Some rate less than carload rate?

Mr. BAILEY. Less than 65 cents, yes, sir; and charged him less than that.

Mr. JENNEY. And when you have gone to the shipper you have solicited the business upon the proposition that you would get a less rate—a less than a carload rate?

Mr. BAILEY. I can not say that.

Commissioner Knapp. What other inducements can you offer 388 to the shipper except that through your intervention he may get something less than carload rates?

Mr. BAILEY. As a rule, the fact that he is going to save money on his shipment is sufficient to appeal to him. Another case, we can give him better time—you can move a straight carload of freight from Chicago to New York sometimes quicker than less than carload shipments.

Mr. KENNEY. Your company in soliciting freight business always appeal, do you not—always offer an inducement to the shipper that you can give him a less rate than he can get from the railroad company?

Mr. BAILEY. Not always.

Mr. JENNEY. You do wherever it is necessary to get the business?
Mr. BAILEY. I presume so.

Mr. JENNEY. And the only way that you can make any money in your business as forwarding agent is through that?

Mr. BAILEY. As far as the domestic end of it is concerned.

Commissioner KNAPP. I want to ask Mr. Bailey right at that point—it seems to me to be possibly the controlling question—take an article which from its nature and use is ordinarily sold to 389 the retailer in less than carloads quantities; now, A and B are dealers in that article, competing in the various accessible markets. A has an arrangement with you under which the difference between carloads and less than carloads lots is divided as you and A may agree upon. B has no such arrangement, either because he does not know of your agency, because you cannot agree with him on the division, because you arbitrarily refuse to take his traffic, or for any other reason. Now, might not that operate to put B under a serious, if not fatal, handicap in his business and amount to an unjust discrimination within the meaning of this law?

Mr. BAILEY. It might. Also in that same point, Mr. Chairman, suppose a man in Chicago is shipping a small lot of one commodity to be carried to New York, then on an expert bill of lading, and it is not convenient or possible for him to fill out a car and get a carload to New York, and he has to compete with another firm and deliver this stuff at Glasgow. The man that has the big lot to ship, five or six different lots to be delivered at five or six different points, can ship his in a car under a through bill of lading in competition with the other man and get it through for half the price.

390 Mr. JENNEY. Now, Mr. Bailey, just how do you do your business; for instance, in Chicago, do one of the agents of your company go to the railroad company, the Wabash or Nickel Plate, or one of the other companies and arrange for a car?

Mr. BAILEY. I presume we order a car from the freight agent of the railroad company.

Mr. JENNEY. And tell him where to place it, either in the yard or at some particular switch?

Mr. JENNEY. Then, do you tell your various customers in Chicago to take the proposed less than carload shipments to that car at that place?

Mr. BAILEY. I assume so. I am not familiar with the local method of handling the stuff in Chicago. All I am familiar with is the stuff that comes from the planing-mill districts. I know there we had the cars placed either—I think it was the Chicago terminal tracks or the C., B. & Q. We would have a car there and one our own men—one of our employes—and these shipments would be delivered right to the car and checked into the car by our man and the dray 391 ticket stamped by us. We check the contents of the car and turn it over to the railroad company as a carload of the material that was in there, and we had the railroad company notified where we wanted this car placed.

Mr. JENNEY. Now, your company, Mr. Bailey, does not have cartmen at Chicago to take the stuff from those various different shippers to the railroad company's station?

Mr. BAILEY. We have a contract with cartmen in Chicago the same as we do here.

Mr. JENNEY. When you make an arrangement with a dozen different shippers to ship less than carload shipments to a certain car, do your cartmen take the commodities to the car?

Mr. BAILEY. If required.

Mr. JENNEY. If not required, their cartmen do?

Mr. BAILEY. They have the option of doing it if they please.

Mr. JENNEY. Don't you know, as a fact, that in your method of doing business there are very much greater delays in the loading of that car than they are loaded by one individual?

Mr. BAILEY. I do not from my own experience.

Mr. JENNEY. You don't know from your own experience.

92 Who pays the car service that accrues on the cars that you ship—the customers or yourself?

Mr. BAILEY. It is usually collected with the freight charges when the car arrives here.

Mr. JENNEY. Don't you know how much—is it paid by you here?

Mr. BAILEY. Yes.

Mr. JENNEY. Then don't you know about how much car service you pay?

Mr. BAILEY. Why, I cannot give you an idea—no; I do not know how much it amounts to per car, or how much per total.

Mr. JENNEY. Did you ever know a car of yours come into New York that had car service accrued on it?

Mr. BAILEY. Come in consigned to us—many of them.

Mr. JENNEY. Your business operations have been confined to Chicago and New York, or have you attempted to assemble freight in other places?

Mr. BAILEY. Well, not to any extent.

Mr. JENNEY. Just in Chicago and New York?

Mr. BAILEY. Just in separate instances where occasion might serve we would consolidate in some other place.

Mr. JENNEY. Have you competitors in your business?

Mr. BAILEY. We have a great many.

93 Mr. JENNEY. From Chicago to New York?

Mr. BAILEY. Yes.

Mr. JENNEY. Forwarding agents?

Mr. BAILEY. Yes.

Mr. JENNEY. Who are engaged in the same work you are engaged in?

Mr. BAILEY. Precisely.

Mr. JENNEY. Any objection to telling us who some of them are?

Mr. BAILEY. Not the slightest.

Mr. JENNEY. Please do so.

Mr. BAILEY. Alfred H. Post & Company, George W. Sheldon Company—that is on the strictly consolidated car business?

Mr. JENNEY. That is what I am getting at.

Mr. RILEY. Yes. That is on eastbound. Now, do you want the westbound, too?

Mr. JENNEY. Yes.

Mr. BAILEY. There is the Furniture Exchange, Chicago, Rock Island & Pacific Railroad, Judson Forwarding Company, American Shipping Company, Trans-Continental Freight Company. I think those are the most important.

Mr. JENNEY. Now, you understand that all of those companies or individuals are engaged in soliciting less than carload freight from shoppers, endeavoring to ship that freight in car loads, obtain a carload rate, and to divide the difference between the carload rate and less than carload rate with the shippers, in consideration for their services?

Mr. BAILEY. That is my belief, with the possible exception thereof, of the Rock Island Railroad.

Mr. JENNEY. You have known, Mr. Bailey, of this rule in the Classification with reference to ownership. Has it or has it not been your experience that when the railroad companies over whose road you have shipped have learned that the shipment was for a forwarder and a bill of lading taken out not in the name of the owner of the goods that they have required the payment of less than carload rates?

Mr. BAILEY. No, sir.

Mr. JENNEY. Have you not required that?

Mr. BAILEY. No, sir; not in all cases; no, sir.

Mr. JENNEY. I am talking of the cases where they have discovered the situation.

Mr. BAILEY. I know of cases where it has been disclosed to them and they have not asked less than carload rates.

Mr. JENNEY. Can you give me any particular occasions where that happened?

395 Mr. BAILEY. In Chicago?

Mr. JENNEY. Any particular line that permits it?

Mr. BAILEY. The Wabash Railroad.

Mr. JENNEY. Habitually?

Mr. BAILEY. I don't know whether it is habitual or not. They did not offer any objections to our doing it.

Mr. JENNEY. How have you information that they have known it?

Mr. BAILEY. Because we told them.

Mr. JENNEY. Whom did you tell?

Mr. BAILEY. One of the men in Mr. Newman's office.

Mr. JENNEY. How long ago was this?

Mr. BAILEY. About a year and a half.

Commissioner KNAPP. Do you know of any such transaction in the last year on any railroad?

Mr. BAILEY. No; I have not been in Chicago looking after the end of it at all, and I have not asked the Chicago people.

Commissioner KNAPP. Do you know of any case within a year where you have obtained a carload rate when the carrier knew that the load was made up of consignments of different shippers?

Mr. BAILEY. I personally do not.

Commissioner KNAPP. Have you any reason to believe that railroad company knew of such a transaction?

Mr. BAILEY. I have the general reason to believe, Mr. Chairman, that the railroad companies in Chicago know what our business consists of and when a carload of freight is offered to them they are quite willing to take it at a carload rate.

Commissioner KNAPP. About how much do you ship from Chicago?

Mr. BAILEY. From Chicago?

Commissioner KNAPP. Yes.

Mr. BAILEY. Well, that varies largely with circumstances. I could say a maximum of two cars a week.

Commissioner KNAPP. And that is all traffic of this kind which you intend to carry under the carload rate, none of it your own?

Mr. BAILEY. Well now, I will have to qualify that a little. There are a good many shipments that come from Chicago for which we pay our bill in Chicago for account of the consignees and transport that freight from Chicago to London, or England, or Germany or France, we having paid for that property in Chicago and collect our money at destination.

Commissioner KNAPP. Give us some idea as to the extent to which you have had—in which you have had carload rates on your shipments? You say they average two cars a week?

Mr. BAILEY. I say the maximum would be two cars a week. It is very rarely we ship more than two cars in one week.

Commissioner KNAPP. What do you estimate has been the aggregate number of carloads say in the last year?

Mr. BAILEY. I should say I don't know the last year—I should say the last four months we had probably 20 cars—25 cars.

Commissioner KNAPP. Now, on how many of those cars did you pay the carload rate?

Mr. BAILEY. Practically none of them.

Commissioner KNAPP. Did you on any?

Mr. BAILEY. I really can not recall. I have not that clerical part of it in my own hands.

Mr. JENNEY. You brought this proceeding, haven't you, because the railroad companies won't permit this practice where they know of it?

Mr. BAILEY. Yes.

Mr. JENNEY. You don't want to pretend here that the railroad companies would permit you to do this business where they know that you are attempting to do it?

Mr. BAILEY. They did permit us to do it in Chicago.

Mr. JENNEY. You say they did on one occasion, a year and a half ago. I am talking about the present time. You bring this proceeding against the Nickel Plate and the Wabash and the Baltimore &

Ohio lines out of Chicago upon the ground they won't permit you to do this, don't you?

399 Mr. BAILEY. With that one?

Mr. JENNEY. Yes.

Mr. BAILEY. That is largely on account of the joint inspection bureau.

Mr. JENNEY. The fact is, they won't permit to ship in your name less than carloads that you have assembled from various different customers on a carload rate, will they, to-day?

Mr. BAILEY. I don't know.

Commissioner KNAPP. That is what you are complaining of?

Mr. BAILEY. Yes; that they have not done it in these particular cases.

Commissioner KNAPP. And will not do it—or refuse to do it?

Mr. BAILEY. Refuse to do it; but there is a circumstance in connection with that. I can take a carload of freight to a railroad company in Chicago—have a bill of lading—have the car loaded on their tracks by us, and ask them to sign it and they will sign it. Before it leaves Chicago it will be inspected by the inspection bureau

and he will take off the marks and the numbers of the contents 400 of this car, and he will say from the marks on the cases that

number of shippers have contributed to that carload, and he will report that to the division freight office or to the agent's office or to some one who makes the billing, and even if a bill of lading has been issued at a carload rate corrections will be issued on the billing, and the shipments will be called, as it is, "set up" by the inspection bureau, and will be charged less than carload.

Mr. JENNEY. When they are set up, what do you do with your customers?

Mr. BAILEY. Pocket the loss.

Mr. JENNEY. You pocket the loss?

Mr. BAILEY. Yes.

Mr. JENNEY. So that you make a contract with the shipper whereby you agree to carry their freight at a less rate, less than carload rate and if the railroad sets you up you pocket the loss?

Mr. BAILEY. I have to.

Mr. JENNEY. So that it is naturally to the interest of your company to try and deceive the railroad company?

Mr. BAILEY. To deceive them—no.

Mr. JENNEY. Because if they catch you at it and set you up you have to pocket the loss.

401 Mr. BAILEY. When we bring in the goods we tell them exactly what it is and ship it in our names to ourselves.

Comr. KNAPP. Your arrangements with those shippers are not conditional arrangements?

Mr. BAILEY. No, sir.

Comr. KNAPP. You do not take their traffic and agree to divide in case you get the carload rate?

Mr. BAILEY. We tell them, "You turn over ten thousand pounds of stuff to us and we will take it to New York at a certain price," and we collect that amount from them when the goods are delivered here, whether it is at the steamer or the dock.

Comr. KNAPP. So that if you have to pay less than carload rates—

Mr. BAILEY. We pay it.

Comr. KNAPP. The loss is yours?

Mr. BAILEY. Yes, sir.

Mr. JENNEY. Your shippers—your customers—they know what your arrangement is?

Mr. BAILEY. I don't know—you mean our arrangement with the railroad or our arrangement with them?

Mr. JENNEY. Both; with them and the railroad.

402 Mr. BAILEY. I don't know that they are familiar with our arrangements with the railroad. I assume they know we are trying to fill a carload.

Mr. JENNEY. Trying to get a car to go on a carload rate?

Mr. BAILEY. Yes.

Mr. JENNEY. And they keep giving you business when they know that is what you are engaged in?

Mr. BAILEY. Yes.

Mr. JENNEY. Do you care to tell us who some of those gentlemen are?

Mr. BAILEY. I don't think it is pertinent.

Mr. JENNEY. I don't care to press you.

Mr. BAILEY. I gave you the names of some of the shippers, I believe, this morning, from one of our waybills.

Mr. JENNEY. I think the only shipper you mentioned was some Hawley Furniture Company.

Mr. BAILEY. That was in connection with a letter that they had received from Mr. Hawley; I mentioned the Hawley Down Draft Furniture Company.

Mr. JENNEY. I assume they are one of your customers, that you had their letter.

403 Mr. BAILEY. I assume so; I don't know positively.

Commissioner KNAPP. Mr. Bailey, has your concern any warehouse in Chicago?

Mr. BAILEY. Not directly.

Commissioner KNAPP. What do you mean by that?

Mr. BAILEY. We use the warehouse of one of the railroad companies to consolidate freight westbound.

Commissioner KNAPP. You have no side track of your own?

Mr. BAILEY. No.

Commissioner KNAPP. Are all your Chicago shipments made from the same point in Chicago?

Mr. BAILEY. No, sir.

Commissioner KNAPP. Where is this warehouse that you speak of?

Mr. BAILEY. It is house No. 6 of the C., B. & Q. Railroad; where it is located I don't know.

Commissioner KNAPP. It is on the C., B. & Q. tracks?

Mr. BAILEY. Yes.

Commissioner KNAPP. Do you hire that from them?

Mr. BAILEY. No; we simply have an arrangement with them that they will let us store this freight in there.

404 Commissioner KNAPP. They are not interested in the movement of that freight?

Mr. BAILEY. Only we usually ship it over the C., B. & Q. Railroad. We pay them storage on it. There is no other arrangement with us than they would make with anybody else. As far as it goes, we simply put a lot of freight there and pay the storage, so much per ton per day. When we get what we want to ship we ship it out, and as a rule it goes over the C., B. & Q. Railroad.

Commissioner KNAPP. I had reference to your eastbound shipments from Chicago.

Mr. BAILEY. We have no warehouse.

Commissioner KNAPP. Where do you receive those shipments?

Mr. BAILEY. Usually at the most convenient siding where the greatest quantity is located.

Commissioner KNAPP. Without reference to the road to which that siding belongs?

Mr. BAILEY. I believe so.

Commissioner KNAPP. Have you any warehouse in New York?

Mr. BAILEY. No, sir.

Commissioner KNAPP. And no side track, of course, here?

Mr. BAILEY. No.

405 Commissioner KNAPP. Your cars are placed, then, for unloading as what is usually known as a team track?

Mr. BAILEY. It is usually lightered to the steamers, the contents of those cars, very largely.

Commissioner KNAPP. Is your business confined to export traffic?

Mr. BAILEY. No, sir.

Commissioner KNAPP. In case of domestic shipments received from Chicago, where are they delivered?

Mr. BAILEY. If we had such we would deliver them at the terminal pier of the railroad company that brought the goods into Jersey City.

Commissioner KNAPP. That is, they would be delivered to you here?

Mr. BAILEY. For instance, when they came in on the Erie Railroad they would go to Duane street, probably, Pennsylvania Railroad piers Nos. 4 and 5; the Lackawanna Railroad pier No. 13, I believe it is—Courtlandt street.

Commissioner KNAPP. If I have understood you, in a case where you assembled carloads of less than carload traffic for different concerns that is billed by you in Chicago sent to New York.

406 Mr. BAILEY. Yes, sir.

Commissioner KNAPP. Suppose it comes over the Erie Railroad, that car is billed to the Export Shipping Association, New York?

Mr. BAILEY. Export Shipping Company.

Commissioner KNAPP. Now, where would that car be delivered in New York?

Mr. BAILEY. The car would arrive at Jersey City or Weehawken; we would receive notice of arrival. It would be billed in here light-erage free, and we would give the railroad instructions where to deliver the contents of the car, the numbers of packages, and marks.

Commissioner KNAPP. If it would be for export it would be alongside?

Mr. BAILEY. Alongside the steamer.

Commissioner KNAPP. Suppose it was domestic traffic.

Mr. BAILEY. Bring it to Duane street.

Commissioner KNAPP. The car would not be brought to Duane street—where would the car be unloaded?

Mr. BAILEY. I don't know whether they would float the car to Duane street or whether they would just bring the contents over by lighter.

Commissioner KNAPP. In a case of domestic shipments to 407 parties here in New York, do you make cartage delivery to their several concerns or warehouses?

Mr. BAILEY. Only if requested for the service that way.

Commissioner KNAPP. Otherwise they would take it—

Mr. BAILEY. From the railroad station.

Commissioner KNAPP. Just at Chicago it would be brought by them to the place where the car was loaded with their carts, or you would pay the cartage and hire some cartmen to do it here?

Mr. BAILEY. Yes, sir.

Mr. JENNEY. Just one further question: If this privilege were extended to you to act as forwarding agent, dividing with the shipper the difference between the carload and less than carload shipments, of course it would be extended to anybody?

Mr. BAILEY. Correct.

Mr. JENNEY. And the inevitable result would be that if no changes in rates in classification were made by the railroad companies, that the shippers of this country would pay any old rate as between a carload and less than a carload rate, depending upon what-408 ever arrangement they made with the forwarding agent?

Mr. BAILEY. That might be.

Mr. JENNEY. And the only way the railroad companies get back to the proposition of equality between shippers would be either to do away with their carload rate or their less than carload rates, one or the other?

Mr. BAILEY. It might come to that; I believe it has been considered before. Take it at the same time, would it not be convenience to the railroad companies to have more of the freight shipped in car-loads?

Mr. JENNEY. Less revenue. I don't know about the convenience.

Mr. WILSON. Just one question, please. You spoke of some other forwarding agencies which you called your competitors. Do you ever work together with the other forwarding agents to make up a carload?

Mr. BAILEY. Eastbound?

Mr. WILSON. East or west bound.

Mr. BAILEY. We have an arrangement with the Judson Forwarding Company, of Chicago, the Transcontinental Freight Company—

I believe we did—I don't know whether it is in force, to make 409 up carloads for the Pacific coast, to Salt Lake City and to Denver.

Mr. WILSON. So that the consolidators consolidate among themselves?

Mr. BAILEY. They do westbound. I do not believe it occurs eastbound.

Mr. WILSON. How do you divide your profits in that case?

Mr. BAILEY. It would depend altogether upon circumstances.

Mr. WILSON. Would it make any difference to the shipper?

Mr. BAILEY. No.

Mr. WILSON. Just make a difference to you?

Mr. BAILEY. No; that is, for instance, if the Judson Company had three shipments and we had four or five and somebody has three or four or five or six, we would bill them together, and the original shippers would get whatever had been agreed upon by the parties to whom they turned over their freight.

Mr. WILSON. Whose name would a shipment like that go out in?

Mr. BAILEY. We would usually insist it would go in 410 ours.

Mr. WILSON. Then the transaction would be this: The Export Shipping Company would bill to itself, say at San Francisco, a consolidated shipment of less than carload traffic furnished by other forwarding agents?

Mr. BAILEY. Yes.

Mr. WILSON. And those in turn received the traffic from the actual owners and shippers of the goods?

Mr. BAILEY. Presumably the owners and shippers.

Mr. WILSON. And there would then be two intermediaries between the carrier and the shipper?

Mr. BAILEY. No; I would not consider that because we would be recognized and would be the shippers of that carload of freight. That stuff would be delivered to this warehouse in Chicago, paid for in the name of the Export Shipping Company. They might stay there for a couple of days and we ourselves would load it into a car and ship in our name. If that would not make us shippers, I don't know what would.

Mr. WILSON. You are not the owners, of course, of that traffic in any sense?

411 Mr. BAILEY. We might have been the owners of some of it.

Mr. WILSON. Particularly the owners of the traffic furnished by the other forwarding companies?

Mr. BAILEY. No.

Commissioner KNAPP. Do you actually buy and sell on your own account?

Mr. BAILEY. Only on definite orders from foreigners. We do no domestic business of that kind at all—buy or sell anything in this country or for resale in this country.

Mr. WILSON. When you deal directly with the shipper, do you make a written contract with them as to the division of this freight?

Mr. BAILEY. I don't think so.

Mr. WILSON. Don't you know?

Mr. BAILEY. I have never seen one of those contracts. If Chicago is making them, it is since I have left there. I have never seen a contract between ourselves and one of those shippers.

Mr. WILSON. Are you president of this company?

Mr. BAILEY. Yes, sir.

412 Mr. WILSON. How do your people get business; do you advertise or canvass?

Mr. BAILEY. We canvass. Very nearly everybody in Chicago, I think, knows us.

Mr. WILSON. Have you circulars that you issue, or advertising matter?

Mr. BAILEY. No. We have issued circulars in the past.

Mr. WILSON. Have you any of those circulars?

Mr. BAILEY. I don't think there are any of them left. I don't believe we have issued any for—well—almost two years.

Mr. WILSON. How would you close a contract with the shippers?

Mr. BAILEY. Over the telephone.

Mr. WILSON. Have you a standard rate that you quote to the shipper, or how is that?

Mr. BAILEY. It is fairly standard; it is flexible.

Mr. WILSON. Suppose you had gotten together almost a carload and you wanted to fill up the balance of the space, would not your rate happen to be favorable then?

Mr. BAILEY. It might.

Mr. WILSON. Who has the authority to quote the different rates to these various shippers?

413 Mr. BAILEY. Our traffic manager.

Mr. WILSON. Any limitations on his authority in that regard?

Mr. BAILEY. No, sir.

Comr. KNAPP. Your business covers quite a wide range of traffic, I infer from what you say?

Mr. BAILEY. Yes.

Comr. KNAPP. Machinery and miscellaneous merchandise.

Mr. BAILEY. Almost everything that is mentioned in the Official Classification.

Mr. CLARKE. You say you usually ship in the name of your company. Now, the car which you complain of, the Nickel Plate Co., the car which you complain of, the Nickel Plate Company, refers to a car at carload rates, which was billed in the name of E. Goldman & Company, was it not?

Mr. BAILEY. I am not sure of that. I have surrendered the bills of lading to the railroad company: you probably have the waybill there and know.

Mr. CLARKE. E. Goldman & Company.

Mr. BAILEY. I will take it for granted that it was.

414 Mr. CLARKE. And later on, and since that, you have billed other cars of goods assembled by you in the name of E. Goldman & Company?

Mr. BAILEY. I won't dispute that, although I have not any definite knowledge of it.

Mr. CLARKE. And you have also billed cars in the name of Foster, Munger & Company?

Mr. BAILEY. Yes, sir.

Mr. CLARKE. And in the name of Allbright, Nell & Company?

Mr. BAILEY. That I don't know.

Mr. CLARK. And also in the name of the Sullivan Machine Company?

Mr. BAILEY. Yes, sir.

Mr. CLARK. And there was nothing on that billing to show that that was a shipment of your company?

Mr. BAILEY. On the billing?

Mr. CLARKE. Yes.

Mr. BAILEY. I don't know. Were those cars consigned to the Export Shipping Company?

415 Mr. CLARKE. No; I have asked you if they were consigned to these various firms whose names I have given, and you have said that they were.

Mr. BAILEY. Consigned to them or by them?

Mr. CLARKE. Consigned by them and to them?

Mr. BAILEY. I don't know about that being consigned to them at New York.

Mr. CLARKE. Do you know that they were not?

Mr. BAILEY. I do not.

Mr. CLARKE. As a matter of fact, you do procure cars of the character under consideration here to be billed in the name of some one of the shippers and to his order?

Mr. BAILEY. I am not positive about being consigned to their order. As to being shipped in Chicago in that way, we have.

Mr. CLARKE. What is the purpose of that?

Mr. BAILEY. For instance, a car from the Sullivan Machinery Company, probably two-thirds of that would be Sullivan Machinery Company's stuff.

Mr. CLARKE. Why didn't you have it consigned in the name of your company, to your company, which you say is your regular practice?

Mr. BAILEY. I believe in some cases the latter to have been the cars shipped in their own name.

416 Mr. CLARKE. It was not then for the purpose of misleading the company into thinking that was a shipment by the Sullivan Machinery Company and not by your company?

Mr. BAILEY. Not to my knowledge.

Mr. CLARKE. Now, you say that you sometimes procure a bill of lading in the name of your company or perhaps in the name of the owner of part of the carload lots—I mean at the carload rate—and later on when it arrives here and the waybill shows that it has been marked up to less than carload rates—is that the fact?

Mr. BAILEY. That is true in one of these instances, I believe.

Mr. CLARKE. Now, might not that arise from the fact that the company did not know at the time the bills of lading, or the shipping bill, was delivered to you, that it was not all owned by one person, and later on it was discovered that it was, and thereupon the less than carload rate was charged?

Mr. BAILEY. There was not any evidence asked for or submitted, so far as I know, as to who was the owner, or who was not.

Mr. CLARKE. As a matter of fact your company has delivered full carloads of traffic all in the name of E. Goldman & Company, but from various owners, haven't you?

417 Mr. BAILEY. We have what?

Mr. CLARKE. As a matter of fact you have delivered to the railroad companies at Chicago various shipments, enough to fill a car in the name of E. Goldman & Company—I mean the dray tickets bore their name?

Mr. BAILEY. Yes.

Mr. CLARKE. Without any suggestion but what they were the owners of the whole; and as a matter of fact it came from various owners?

Mr. BAILEY. I presume that is true.

Commissioner KNAPP. In such case as that your agent would have to ask the actual shipper to send his traffic to this place where your car was, not in his own name, but in the name of Goldman & Company?

Mr. BAILEY. Yes, sir.

Mr. CLARKE. And you took the shipping bill in the name of Goldman & Company?

Mr. BAILEY. Yes.

Mr. CLARKE. And you got a bill of lading in that name, have you not?

Mr. BAILEY. I presume so.

418 Mr. CLARKE. And then you found when you called for the goods at this end of the line it had been marked up to less than carload rates, if the railroad discovered that E. Goldman & Company was not the actual owner?

Mr. BAILEY. In some cases.

Mr. CLARKE. You spoke of various westbound forwarders as your competitors; you meant by that westbound from Chicago?

Mr. BAILEY. Yes.

Mr. CLARKE. You have spoken of delivering—of having some of these carloads of goods delivered here at Duane street, for instance, upon the Erie Railroad. Now, if the owners desired it, you deliver at their place of business, do you?

Mr. BAILEY. We would truck it from the railroad station to their place of business, yes.

Mr. CLARKE. After the delivery by the railroad company is made to you or your agent?

Mr. BAILEY. The delivery of the railroad company?

Commissioner KNAPP. Yes. Delivered by the railroad company.

Mr. CLARKE. It is made on our order.

Commissioner KNAPP. Perhaps you have stated, but do you 419 do the same sort of business westbound out of New York that you do eastbound out of Chicago?

Mr. BAILEY. Not any more.

Commissioner KNAPP. Do you know of any concern that does? 420 Mr. BAILEY. I believe E. Caldwell & Company do.

Commissioner KNAPP. What reason have you to believe they do?

Mr. BAILEY. Information I had received from railroad agents.

Commissioner KNAPP. Do you refer now to any recent transactions?

Mr. BAILEY. Oh, probably nothing within a year. I have not investigated the matter, and it might be safe to qualify it; it is only on Pacific coast business and oriental business to the Pacific coast. I don't know anybody consolidating carloads to interior points in the United States.

Commissioner KNAPP. To make sure, to supplement Mr. Clarke's question as to the various concerns mentioned as doing this same sort of business in competition with you, including the Rock Island road, are shipping entirely west of Chicago?

Mr. BAILEY. With the exception of Post & Company and Sheldon & Company.

Commissioner KNAPP. From what points do they ship?

Mr. BAILEY. Chicago to New York. I believe they are the 421 only two concerns in Chicago who have any interest in this business outside of ourselves.

Commissioner KNAPP. And they are doing it now?

Mr. BAILEY. So far as I know.

Commissioner KNAPP. Have you any knowledge of any shipments by them, say, within the last three or four months?

Mr. BAILEY. Not that I could give you car numbers or contents—no; only information I have had from different railroad men that such cars are being shipped them.

Commissioner KNAPP. From what railroad men have you received any such information?

Mr. BAILEY. Is it necessary for me to answer that?

Commissioner KNAPP. Yes. What is there about your business that you are not willing to give the name of a railroad man you do business with?

Mr. CLARKE. This information seems to be a letter from my Chicago office, who mentioned the fact that Sheldon & Company had loaded such and such a car on such and such a track and for New York, and that he had been told so by a railroad man.

Commissioner KNAPP. That is the writer to you?

Mr. BAILEY. Yes.

Commissioner KNAPP. Stated in the letter that he had been told so by a railroad man?

422 Mr. BAILEY. Yes; we investigated one of those cases and found it to be true that such a car had been shipped.

Commissioner KNAPP. When did that occur?

Mr. BAILEY. I can not recall exactly. I think it was last spring. I have not been very much interested in it since.

Commissioner KNAPP. Did the letter you refer to give the name of the railroad official to which he referred?

Mr. BAILEY. I am under the impression that it did; I could not tell now without looking it up.

Commissioner KNAPP. You don't know what the man's name was?

Mr. BAILEY. No, sir; I do not recall it.

Commissioner KNAPP. Nor the road with which he was connected?

Mr. BAILEY. I can not even recall that. My impression is it was the Red Line commercial agent in Chicago or one of their soliciting agents—contracting agents.

Commissioner KNAPP. Any further questions to be asked, Mr. Bailey? Any further explanation you desire to make, Mr. Bailey, or any further statement that you wish to put on the record?

Mr. BAILEY. No; I believe that I have recalled everything that I have to say.

423 Commissioner KNAPP. Very well. You have no further witnesses, I think, you stated.

Mr. BAILEY. No, sir. There is one thing I might state, Mr. Chairman, and that is that we would be quite willing to handle carloads of one class from Chicago to New York at the carload rate charged for by the railroad company, in order to secure the forwarding of those shipments abroad—that is, the export movement—in other words, that we would not make any profit out of the transaction from Chicago to New York, as far as the transportation is concerned, if we got a rate fifth class, 30 cents, we would charge each shipper 30 cents, provided they would give us the export movement for the handling of it from New York to such foreign port or foreign destination as it was going to, and the fact that the railroad companies will issue bills of lading on split cars militates against us, because we cannot secure the business against their competition.

Commissioner KNAPP. That is, you are willing to take a particular class, say, fifth class?

Mr. BAILEY. We are willing to handle any freight from Chicago to New York.

Commissioner KNAPP. Any class?

424 Mr. BAILEY. Yes.

Commissioner KNAPP. And pay the less than carload rates, provided you are allowed to have separate bills of lading to different consignees?

Mr. BAILEY. No, sir.

Commissioner KNAPP. What is your proposition, then?

Mr. BAILEY. The proposition is this: If I get a get a shipment, one shipment from each of five machinery houses in Chicago, and the railroad company will give us the bill of lading at 30 cents from Chicago to New York on that car, the contents being for export, and the shippers allow us to handle the export under that delivery or to steamer and on the other side, we will charge them 30 cents per hundred pounds for their proportion of freight in the car, or the same rate we pay.

Commissioner KNAPP. Would that be less than carload rates?

Mr. BAILEY. That would be the carload rate.

Mr. JENNEY. I understand that proposition; it is that he would not divide with the shipper.

Mr. BAILEY. They would get the benefit of the carload rate the same as we get; in other words, they will have carload rates on 425 their smaller shipments the same as mentioned in that case of Armour & Company having half a dozen shipments in the one car. We would do the same thing.

Mr. JENNEY. Our revenue would be reduced just as much. The only suggestion you make is you would not divide with the shipper?

Mr. BAILEY. There would be nothing to divide, as far as that goes. You charge 30 cents and we charge 30 cents and the shipper pays 30 cents.

Commissioner KNAPP. He says if you will allow him to do this he will give the shipper the entire difference. That would only increase the discrimination against the less than carload shippers who did not enjoy the benefit of your service?

Mr. JENNEY. That is just what it was. We would like to retire for one moment.

(Counsel retires for consultation.)

Mr. JENNEY. I just want to ask Mr. Ives one question with reference to this exhibit: Whether or not, Mr. Ives, in practice this provision 464—which was introduced in the testimony this afternoon with reference to export provisions—is in practice read in connection with the classification rule providing that the consignor or 426 the consignee must be the owner of the goods?

Mr. IVES. Oh, yes; the classification applies on every tariff we issue unless there is a specific exception to it noted in that circular. I think that is one of Mr. E. E. Clarke's very strict rules.

Commissioner KNAPP. It seems a proper one.

Mr. JENNEY. Now, Mr. Chairman, we have consulted with the other counsel and with the traffic officials, and we feel that the facts pertaining to this question are sufficiently before the Commission without introducing any testimony on behalf of the defendants showing the objections from our point of view to adopting the practice which the complainant asks to have the Commission hold legal; but at the same time we have our traffic officials here, and if you desire to ask any questions of them we would be very glad. They are available here and you may ask them any questions that you may desire affecting the general question, but we feel that there is nothing further which we can say here which will help the Commission to a determination of that question. Mr. Caldwell is here and Mr. Ives and Mr. Webster and Mr. Gallagher.

Commissioner KNAPP. I think I appreciate the question and
427 I understand the facts upon which arises the general facts. It might be well, Mr. Jenney, more by way of argument than as a development of the facts, to have one of these traffic officials state the objections to the rule which complainants are desirous to have adopted.

428 Mr. JENNEY. I will adopt your suggestion.

Commissioner KNAPP. The facts appear to be fully developed, so that one perfectly understands what the complainant company desires to do. They apparently are not allowed to do it under the rules. What are the objections to such a change in the rules as he in effect desires?

Mr. JENNEY. Mr. Caldwell, as you are vice-president of the Lackawanna Co., I will ask you first.

B. D. CALDWELL, called as a witness, being duly sworn, testified as follows:

Mr. JENNEY. I want you in your own way to tell the chairman the objections, from your standpoint, to a modification in the classification rules which would permit a forwarder of freight to assemble less than carload freight from various different shippers, and ship it for the carload rates?

Mr. CALDWELL. I don't know that I can do so in a way that will give all of the objections. I think, however, that there are a number of very great objections, which have been in my mind, which
429 would appeal to the Commission as they have to me, and to the carriers in general. As I have listened to the testimony of the petitioner to-day, it has seemed to me that what he seeks to have brought about would result in a substantially complete defeat of the provisions of the present law with respect to the publicity of rates on the part of the carriers, and the application—the requirement upon the carriers to see that rates are made alike to all shippers; and that, to my mind, is the greatest possible, and, I think, an insurmountable objection to producing a condition with the carriers such as the petitioner seeks.

The law, as I understand it, and I think as it is generally understood by the carriers to-day, is more or less primarily intended to produce a relation between the carrier and the shipper whereby the actions of the carrier, its rates, its terms of transportation, shall be made known to the shipper, and that they shall be extended to shippers without discrimination. And it does seem to me, without going into exact details, that there must be a measure of responsibility upon the carrier with respect to not permitting an intermediary basis that will defeat that.

430 Now, the second great objection, and right along that line, that appeals to me, is that it would of necessity produce such a situation whereby the rights of the intermediaries and his arrangements with shippers would have to be uniform, and to an extent, at least, known to and adopted by the carriers——

Mr. BAILEY. I believe that is hardly an answer to the question.

Mr. CALDWELL. Otherwise, it seems to me that a plan such as proposed would create a chaotic condition with respect to rates which would be promotive of irregular practices. Now, we have got to be guided in these matters very largely by our experience. Our experience in the past with respect to forwarding agents has been that they sought to secure their remuneration from any source available, and in the past largely from the railroad companies; the idea being that they might adopt such measures as would give the shipper the largest measure of benefit, so as to secure him for their client, and make the avenue which they presented the one which was most de-

431 sirable to him, and in so doing, their attitude in the past has been largely of seeking to secure from the railroad companies

allowances or commissions on competitive grounds that they were able to secure and control the traffic; and I apprehend that if any such condition as this was brought about as the petitioner asks for here that the next step would be the controlling of competitive traffic on his part, and others engaged in like business, which would enable them to go to railroad companies and seek to get a compensation from the railroad companies; and it seems to me that it would somewhat follow that if this was legalized that it would be at least construed, or might be construed, as perfectly legal for a carrier to recognize them as an agent and make a contract arrangement of some kind with them, payments under which, it seems to me, there would be a constant temptation to divide with the shipper, just as the difference between the carload rate and the less than carload rate, it has been admitted here, have been divided with the shipper.

To my mind, those are absolutely insurmountable objections under the present law to permitting a condition such as the petitioner asks for.

There are a number of other reasons of objection that are 432 more or less minor, one of which I might mention. It has been suggested to me here, and I have known of it in the past, that where the forwarder undertook to act for the shipper, it was

sometimes very difficult to know just who the shipper was; his identity was more or less concealed; and there was a question of responsibility there, and then the lack of responsibility, or apparent lack of responsibility, of the forwarder under the law. If the forwarder is, as he wishes to be understood, merely a shipper, has he the same responsibility under the law with respect to a departure from the rates, or has he any responsibility under the law? There is the question of payment of claims, and all that sort of thing, which is getting to be more and more a vital question with respect to promptness of payment of claims, with respect to increasing claims for loss and damage, and things of that kind, which carriers to-day not only feel an added responsibility with respect to seeking to be in a position to pay just claims promptly, but also feel a very great responsibility to see that so-called concealed loss and damage claims are actually just and actual losses, and do not possibly represent under that guise some payments which may be in disregard of the law.

433 Now, it is important that the carrier and the shipper shall get as close together as possible on those matters, rather than to be dealing through intermediaries whose principal object in the whole matter is to seek a benefit to them in return for their services. Now, I will not take any more time. There are some minor features of objection. I would be glad to answer any question, Mr. Chairman, that you want to ask.

Mr. JENNEY. I would like to ask this: In your opinion, Mr. Caldwell, would there be any greater incentive where railroad companies were dealing with forwarding agents rather than with shippers to perpetrate fraud upon the railroad company in connection with false billing and in connection with weights or otherwise, where you were dealing with a sharp forwarding agent who was up to all the tricks of the trade, as it were, than with the ordinary shipper?

Mr. CALDWELL. I have no hesitation in answering that in the affirmative, not in a necessary reflection upon the methods of the forwarding agents, so much as because of the seeming absolute lack of responsibility under the law of the forwarding agent.

434 That of itself it seems to me would be an encouragement to the dishonest shipper to engage in such practice by virtue of the difficulty of locating upon him definitely his irregularity. And we know by experience that there is a certain amount of that going on, by the constant detection of our inspectors.

Mr. BAILEY. May I state that our instructions to our Chicago office, our traffic manager, and our employes, were absolutely that there must not be the slightest attempt in any way to disguise by billing the rates or the information as to the articles that were to be shipped; that they were to be all of the same class in carloads, and the minimum carload.

Commissioner KNAPP. Mr. Caldwell took occasion to say that he made no reflection on the methods of your company in conducting its business, but he expresses the opinion from his experience as traffic

man that that method of doing business, which, if sanctioned, must become quite general, would furnish the inducement, and to some extent perhaps, the opportunity, for these irregular practices, and he urges that as one of the objections to adopting such a rule as you desire.

435 Mr. JENNEY. Another minor matter, Mr. Caldwell. It is recognized, is it not, that the charge of the railroad companies for holding their freight cars for loading or unloading, known as demurrage, is inadequate compensation to the railroad companies?

Mr. CALDWELL. Yes, sir; I think it is generally recognized.

Mr. JENNEY. And if business were done generally by forwarding agents, using a car of the railroad company for a storehouse, as it were, in which their business would be assembled, or in which their freight would be held until taken by the various different consignees, would not it be inevitable that there would be more delay in loading and unloading than though the goods were shipped by the owner of the freight?

Mr. CALDWELL. Unquestionably so, and the record in this case, those particular cases which were shipped over our line, shows that conclusively so. I think I am correct on this, Mr. Chairman, in saying that, as a rule, no demurrage with the great mass of shippers accrues at the point of shipment.

Commissioner KNAPP. On carload shipments?

436 Mr. CALDWELL. On carload shipments, as a rule, I said. It is exceptional when that is the case at the point of shipment. As I understand it, in all the cases I have seen, it is substantially the absolute rule that it did occur with respect to shipments of this kind, and it is perfectly natural that it should be so. I don't see how you could escape it.

Mr. BAILEY. Does that apply in the East or in the West?

Mr. CALDWELL. I think the rule with respect to demurrage as to cars held at point of loading is general throughout the country.

Mr. BAILEY. That is, from your own experience?

Mr. CALDWELL. Yes; that it applies here as well as West. But the point I made was that on carload shipments, as a rule, they were not held at the point of loading enough to result in the penalty applying?

Mr. BAILEY. Not when they are loaded on team tracks?

Mr. CALDWELL. A great majority of carload shipments are loaded on team tracks.

Mr. BAILEY. Or else on private sidings?

Mr. CALDWELL. Or else on private sidings.

437 Commissioner KNAPP. Have you completed your questions?

Mr. JENNEY. Yes.

Commissioner KNAPP. Ask him any questions you wish, Mr. Bailey.

Mr. BAILEY. I have brought out all I care to, I think.

Mr. CALDWELL. I have nothing more to add, Mr. Chairman, except it seems to me, it will appeal to all of us that if the practice, such as is proposed, were legalized, that it would inevitably result in the

springing up all over the country of a large number of the so-called forwarding agents who seek by consolidating cars to give the shipper the benefit of a lower rate on less than carload business than applies in the railroad companies' tariffs. Now, that will produce, I think, a practically chaotic condition with respect to the railroad companies until such time, perhaps, as they may be forced, as already suggested, to withdraw either the less than carload or the carload rates, so as to have only one. I think that is the inevitable result of such a condition.

Mr. BAILEY. Do you know how long it has been since the railroads put the rule in force against forwarding agents?

438 Mr. CALDWELL. I do not know the exact date. I remember it distinctly, as to what brought it about, but I do not remember the exact date that it was put in.

Mr. BAILEY. About what date?

Mr. CALDWELL. My recollection is that it was brought out in connection with some of these cases that were tried some years ago, some four or five years ago, but I do not remember the exact date.

Mr. BAILEY. You were in the railroad business prior to that time?

Mr. CALDWELL. Yes, sir.

Mr. BAILEY. And forwarding agents were also?

Mr. CALDWELL. Yes, prior to that time, under stress of competition, and the ability of the forwarding agent in securing traffic to turn it over to a railroad company has resulted in some sections of the practice of permitting them to do so.

Mr. BAILEY. And that practice was in general?

Mr. CALDWELL. I do not say it was general, but it was in vogue in some places, growing out of competitive conditions.

439 Mr. BAILEY. There was not any reason why it should not become general at that time?

Mr. CALDWELL. It was considered by, I think, the majority of railroad people as an iniquitous practice then, and that is why they got away from it.

Mr. BAILEY. But the business was profitable, apparently—

Mr. CALDWELL. Absolutely the contrary—

Mr. BAILEY. To the forwarding agents, I mean.

Mr. CALDWELL. Oh, I beg your pardon. I cannot speak as to that.

Mr. BAILEY. The prospects were that it was or they would not be in it, but at the same time it did not induce them to suggest that they do what you suggest now, open up all over the country.

Mr. CALDWELL. On the contrary, it did. There were a great many more of them then than now, and as I understand, the most of them, who were then engaged have been obliged to go out of business because of the fact that opportunities are not now presented for them, except such few who, like yourself, insist upon doing it in disregard of the railroad companies' tariffs.

Commissioner KNAPP. Any further questions, Mr. Bailey?

440 Mr. BAILEY. No.

Mr. JENNEY. Mr. Ives, have you anything further to add?

Mr. IVES. Nothing further.

Commissioner KNAPP. Mr. Bailey, that seems to me to go to the serious aspect of this question. Would not the rule which you invoke lead either to obvious discriminations between less than carload shippers, or to such an extensive use of the forwarding agents as would ultimately pretty nearly force the abolishing of the distinction between carload and less than carload rates?

Mr. BAILEY. On the other hand, unless the railroad companies will absolutely stop it so that our competitors cannot do it, and will stop it themselves, it will force such forwarding companies as ours out of business, and now we want to know if this is legal, and if it is right to do it we will go ahead. If it is not, we are going to stop it as far as we are concerned, and want to stop it as soon as possible. Now if they have the right to take these shipments as they do, simply because the shipper happens to be the owner, and not recognize us as

shipper, because we do not own the property and have not
441 paid for it, very well, then we cannot do business with them.

On the contrary, if we had the same right to ship cars that any other corporation or individual has, we could go ahead.

Commissioner KNAPP. As you put that matter, Mr. Bailey, you seem to lose sight of the distinction that is important. You have got the same right to become the owner of property that any other man has.

Mr. BAILEY. Yes.

Commissioner KNAPP. If you go to Chicago and buy a carload of property it becomes yours, and you have got a right to ship it as the owner and get the carload rate.

Mr. BAILEY. It would require us to go to a court of law to convince the railroad companies out of Chicago that we were the owners of a car of property now.

Commissioner KNAPP. Well, what disposition do you want to make of the case? All the facts necessary to its determination appear to be of record, and the objections to what you desire are indicated both in the testimony and in the record.

Mr. BAILEY. I am willing to submit it so far as we are concerned.

442 **Commissioner KNAPP.** On the testimony?

Mr. BAILEY. Yes.

Mr. JENNEY. We do not care to present any written or oral argument to the Commission unless they desire it.

Commissioner KNAPP. Very well; I will take the case, and if my associates, on being advised of the proposal to submit it on the testimony, are satisfied to consider it in that shape, we will make the earliest disposition of it that we can. If they should think that there ought to be either briefs filed or oral arguments, or both, you will be so advised at an early date. If further argument is desired you will be notified within the next ten days or two weeks.

(Hearing closed.)

443 BEFORE THE INTERSTATE COMMERCE COMMISSION.

No. 1228. Export Shipping Company vs. Wabash Railroad Company et al.

No. 1229. Export Shipping Company vs. New York, Chicago & St. Louis Railroad Co. et al.

No. 1230. Export Shipping Company vs. Baltimore & Ohio Railroad Co.

WASHINGTON, D. C., December 20, 1907.

The above entitled cases came on to be heard before Commissioner Knapp (chairman) at 10 o'clock a. m.

Present: Commissioner Knapp (chairman), Interstate 444 Commerce Commission. Also present: Mr. Slusser, esq., representing the Rockford Manufacturers & Shippers' Association, of Rockford, Illinois; the Manufacturers' Association of Jamestown; the Judson Freight Forwarding Company and others—intervening petitioners; John G. Wilson, esq., for the B. & O. Railroad Company; William S. Jenney, esq., for the D., L. & W. Railroad Company; John P. Clarke, for the N. Y., C. & St. L. Railroad Company et al.

The CHAIRMAN. Gentlemen, the testimony in three cases brought by the Export Shipping Company against various operating lines between Chicago and New York was heard in New York on the 28th of October. It was understood at that time that the case as then presented would be submitted to the Commission for determination,

or, if desired, it would be assigned for oral argument at a later 445 date in Washington. Now, long afterwards certain concerns, apparently engaged in business similar to that conducted by the complainants, and who perhaps had seen notice of that New York hearing in the papers, made application to be heard before the question was decided; and thereupon an order was made allowing their intervention, and at the request of some of them the case was opened for the taking of further testimony at this time.

You understand that the hearing to-day is simply for the purpose of taking further testimony, and that the whole question will be open to argument before the Commission on the 8th of January.

What further appearances are there in this case?

Mr. SLUSSER. I represent several organizations, manufacturing associations; but I do not know that it will be necessary to formally enter appearances in the cases. Their representatives are here to give testimony, but I think, unless you deem it necessary, it will not be important for me to enter their appearances.

The CHAIRMAN. Perhaps the record should show, for the information of the defendants, at least some of the concerns you represent.

Mr. SLUSSER. I represent the Rockford Manufacturers' and 446 Shippers' Association, of Rockford, Illinois. They are engaged in the manufacture and sale of furniture; also the

Manufacturers' Association of Jamestown. Also the Judson Freight Forwarding Company. Those are three of the concerns I represent.

The CHAIRMAN. Are there any other parties or counsel who desire to have their appearances noted on the record? If not, we will proceed to take any additional testimony that may be offered.

Mr. SLUSSER. Would it be called inappropriate if I should state at this time the position of the intervening petitioners here and what our position is?

The CHAIRMAN. You may do so.

Mr. SLUSSER. Possibly it might clarify the situation and shorten the hearing.

Our contention is that the note to Rule 5-b of the Official Classification—and I refer to the Official Classification No. 30, although I believe there is a later one out—is in derogation of the second section of the interstate commerce act. We have no complaint to make against the Rule 5-b as it stands with the note eliminated. That is,

we do not complain of a rule that requires that freight shipped
447 at carload rates shall be tendered for shipment on one day and
at one forwarding station, consigned by one consignor to
one consignor. We think that is entirely a proper rule, and one that
is in harmony with the interstate commerce act.

I may perhaps be pardoned for saying this. That in my judgment the section *section* of the interstate commerce act is in effect a copy of the 90th section of the Consolidated Railway Clauses Act of England, which was, in effect, the same clause that had been carried into the charters of the various railways of England, and known as Lord Shaftesbury's equality clauses. I think the English law afforded the model for the American statute, the section *section* of our interstate commerce statute. Although the wording is somewhat different, to my mind the effect is the same.

Having in mind the well-known rule of construction that where the legislative body or authority of one state or country adopts either literally or in effect, the law of another state or country, it must be held to have also adopted the interpretation of the law as

given by the courts of the other state or country. So that it
448 seems to me that when this act was passed the Congress must
have intended that the interpretation put upon it should be
that put upon it by the English courts, and in the English courts
all phrases or words similar, or "the same circumstances," similar to
the words used in our statutes, have been held to relate to a condition
of carriage, and not at all to the ownership of the goods in transit
or to the consignor or consignee.

Under the English statute, however, it was always treated as a
question of fact as to whether or not it cost the railway carriers more
money to carry a consolidated package or a consolidated car than a
package or a car where the ownership of the goods in transit was
vested in one person. While that question has been treated in Eng-
land, and found against the railway companies, I have considerable
doubt as to whether that question was decided for the conditions in

America, and probably that is a question of fact for this Commission to determine, as to whether there is a substantial added burden put upon the railway carriers in moving from the point of origin to the point of destination a consolidated car.

It seems to me that that is one of the questions that 449 ought to be determined from evidence at this hearing.

Secondary to that, it seems to me it is important to show the effect that the enforcements of this rule would have upon the commerce of the country, and upon that question I want to offer some evidence. In fact, I want to offer some evidence to show that under the existing commercial conditions in the United States the enforcement of this note is impossible: it can not be done any more than it is possible for a man to stop water from running down hill.

I want to show that the railways within the territory of the Official Classification do not enforce this rule. Nor can they. That is all I care to state.

The CHAIRMAN. Whom will you call?

Mr. SLUSSER. I will call Mr. Peterson.

Mr. CLARKE. Before that I would like to suggest that there be entered an order, or at least that there be an understanding, that the pleadings shall be formed throughout so as to express just that the issue is we are trying here. You will remember you announced in the

hearing in New York that the case would be regarded as 450 amended so as to challenge the reasonableness of the rule, and so on. No amended complaint has been filed. What is rather an argument than a pleading has been filed by the intervening parties. I would ask that they be required to state and set up what their claim is, and that opportunity be given the defendants to answer. Then it may be clear just what we are trying later on.

The CHAIRMAN. Is it not sufficient for them to challenge the reasonableness and the legality of the note to Rule 5?

Mr. CLARKE. Perhaps it would be, but in New York they challenge the rule. Now they are challenging the note. The original pleadings were simply an action to recover.

The CHAIRMAN. Yes; I discovered when the cases were taken up in New York, that the original complaints were simply to recover reparation on certain specific shipments; but it seemed to me that the broader question ought to be determined.

Mr. CLARKE. Surely; and I am quite in favor of its being done, but I do think we should have the exact issue presented by the pleadings in the case before argument.

451 Mr. SLUSSER. I came into this with the intervening petitions on the assumption that by the stipulation of the parties in the record, as announced by the chairman, who conducted the hearing in New York, that it was understood that the issue was raised as to the reasonableness of this rule, and that was the question that was really to be determined at this hearing. I am quite willing that any stipulation should be carried into the record, so far as the interven-

ing petitioners are concerned, that will raise the issue that I have outlined, and that it may be considered as answered.

Mr. CLARKE. There is no disputing between us that we understand what the issue is, but I personally would like it to appear on the record before the final argument.

The CHAIRMAN. Judge Slusser, will you formulate such an allegation as you would embody if you were instituting original proceedings?

Mr. SLUSSER. In writing?

The CHAIRMAN. Yes.

Mr. SLUSSER. And with the privilege of filing it a little later?

The CHAIRMAN. Oh, yes.

452 Mr. SLUSSER. All right.

The CHAIRMAN. And let the answers already made stand as an answer to the amended petition?

Mr. SLUSSER. And may it be understood that I may file that as an amendment to the intervening petition?

The CHAIRMAN. Yes. The form is not important, so that the defendants be apprised of the precise contention.

Mr. SLUSSER. Very well.

Mr. JENNEY. Do you challenge any other rule in our Classification except the note to Rule 5-b?

Mr. SLUSSER. That is the only one I challenge.

Mr. JENNEY. You are familiar with the classifications?

Mr. SLUSSER. I think I am fairly familiar with it. I am not a railroad man and do not pretend to be a railroad man. What I contend for is this, however: That any shipper or any concern that tenders goods of such a kind and classification that they would otherwise be entitled to go at carload rates may ship them at those rates from one consignor to one consignee.

The CHAIRMAN. Irrespective of the ownership?

453 Mr. SLUSSER. Irrespective of whether there is a diversity of the ownership of the goods in responsibility or in so long as the contractual relations between the railroad company and the shipper are with one consignor.

Mr. JENNEY. And see whether you question the reasonableness and propriety of that, will you?

Mr. SLUSSER. Is that under Classification 30—Rule 15?

Mr. JENNEY. Yes.

Mr. SLUSSER. I do not recall these rules by number.

Mr. JENNEY. I will read this rule:

"Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be way-billed as separate shipments and freight charged accordingly."

“NOTE.—The term ‘forwarding agents’ referred to in this
454 rule shall be construed to mean agents of actual consignors
of the property or any party interested in the combination of

I. c. l. shipments of articles from several consignors at point of origin."

Mr. SLUSSER. Of course we do challenge that rule. Part of it is all right, but in so far as it prevents the consolidation of goods in one car to be shipped under one bill of lading, to be shipped by one consignor to one consignee, all other things entitled to be shipped at carload rates, we do challenge that rule, or any other rule that contravenes that right.

Mr. WILSON. We would reserve the right to file a specific and definite answer to the amended declaration.

The CHAIRMAN. That is understood.

Mr. WILSON. The answer filed is an answer to the declaration as originally made.

P. A. PETERSON, produced as a witness on behalf of the intervenors, being first duly sworn, is examined:

Mr. SLUSSER. What is your residence and occupation?

455 Mr. PETERSON. Rockford, Illinois; I am in the manufacturing business.

Mr. SLUSSER. You reside at Rockford, Illinois. What official relation have you with the Association of Furniture Manufacturers at Rockford, Illinois?

Mr. PETERSON. I am the president of the association.

Mr. SLUSSER. Will you kindly state approximately the number of furniture manufacturers at that place?

Mr. PETERSON. There are 17.

Mr. SLUSSER. About how much capital is invested in the business at Rockford?

Mr. PETERSON. Two and a quarter million dollars.

Mr. SLUSSER. How many of those concerns may be considered large manufacturers?

Mr. PETERSON. There are two or three.

Mr. SLUSSER. And what proportions of the capital is represented by those manufacturers?

Mr. PETERSON. About one-fourth.

Mr. SLUSSER. And the rest of it by small concerns?

Mr. PETERSON. Yes.

Mr. SLUSSER. Will you indicate what is in your trade considered a small manufacture, how much capital invested in the business?

456 Mr. PETERSON. Well, one that has \$200,000 or less invested is considered small.

Mr. SLUSSER. Does it require a large amount of money to handle the business?

Mr. PETERSON. It does.

Mr. SLUSSER. Where do the concerns in your association find a market for their product?

Mr. PETERSON. All over the United States.

Mr. SLUSSER. And shipped by railroad?

Mr. PETERSON. Shipped by railroad; yes, sir.

Mr. SLUSSER. Will you state whether the conditions of trade are such that to some extent it is necessary to ship by the individual concerns less than carload lots in order to compete in the market and to reach their customers?

Mr. PETERSON. The shippers within reasonable distances have their goods shipped to them in less than carload lots, but when you go to ship several hundred miles we make up carload lots between the factories as much as possible. We do this partly to save the expense, and a great deal to save the damage on the goods. We 457 have found that the railroad employees handle furniture packages the same as they do trunks or clothing, and a large percentage is more or less injured. For small damages that are done to our goods, injuries of a dollar or two, we do not file any claims, because there is no use in doing so. The railroads decline to accept them, and then, another thing, if they do not decline, the bother and the labor and the time it takes to collect them is such that we are the losers in the long run anyway.

Mr. SLUSSER. Are you able to state, Mr. Peterson, to what extent shipments from various owners are combined into carload lots and shipped on long-distance hauls to various parts of the country? I want to know whether it is any considerable portion of the business of your output.

Mr. JENNEY. I do not want to be technical in objecting to questions, but the only railroads that are represented in these proceedings are the Wabash and the Nickel Plate and the Baltimore & Ohio and the Lackawanna. We may know about the conditions on our own roads and may be in a position to dispute any testimony as to conditions about our own roads, but I think the testimony of the intervening petitioners ought to be confined to the roads mentioned. 458

Mr. SLUSSER. In answer to that, I think I should be permitted to say this: That the hearing here, while technically it arose upon the petition against these three railroads, involves the construction of the second section of the interstate commerce act. This decision will be an interpretation of that act, and if this Commission shall interpret the act in accordance with the note to Rule 5-b, then it would manifestly be a discrimination for the western roads, or any other roads than those represented here, to permit consolidation of carloads, and to have those goods shipped at carload rates; and therefore it seems to me that the effect of that interpretation upon the commerce of the country becomes of prime importance, and that that is the large question which is to be determined at this hearing.

The CHAIRMAN. It occurs to me that the practice on other roads might be shown, as bearing upon the reasonableness or otherwise of the rates of the roads in question in Official Classification territory. Moreover, the order of the Commission which reopened this case

for the taking of further testimony, and fixing a day for 459 argument of the whole question has been served generally upon the railroads of the country; at least the principal railroads

have been notified that they would have an opportunity to present any testimony.

Mr. WILSON. May I ask whether that notice related to this hearing or to the argument fixed for January 8th?

The CHAIRMAN. Well, I do not know as to that.

Mr. JENNEY. My understanding was the notice was in regard to the argument on the 8th of January, and that the railroads have had no notice to appear here. Of course we do not know what the practice or conditions are on other roads, and we are absolutely at the mercy of the complainants as to what testimony they introduce, we having no opportunity to show anything contrary to the facts or testimony they advance, and therefore it seems to me that this will be rather unfair. It might be, if they are permitted to go ahead and give this testimony, that the Commission would determine the case upon a state of facts, according to the testimony given, which really did not exist.

460 Mr. SLUSSER. If counsel remember the proceedings at the last hearing, at that time the matter of shipping goods over various railroads and throughout the United States was gone into.

Mr. JENNEY. Only by Mr. Ives.

Mr. SLUSSER. I do not know. I know it was done without objection. I have it in the record here.

The CHAIRMAN. Suppose you make your question a little more specific and take up shipments into Official Classification territory first. You said something to the effect that the rule is not enforced in Official Classification territory.

Mr. SLUSSER. I do not claim that in reference to the products of Mr. Peterson's association; I have in mind a different kind of products.

The CHAIRMAN. Where shipments are made under the Western or Southern Classification are they governed by the rules in these classifications?

Mr. SLUSSER. The Official Classification, of course, the rule and note 5-b prohibits the consolidating of cars within the territory of the Official Classification. Under the western tariffs, however, they permit these consolidated cars to go forward; so that a car 461 can originate in eastern territory and be shipped to a point west of the Mississippi River and be entitled to carload rates, even though it is a consolidated car. That practice is looked upon with favor by the western railroads, and there is no question made about the right to ship cars within that territory. It seems to me that it becomes of prime importance, in challenging and determining the reasonableness of the rule, for the Commission to know what the effect is upon the commerce and upon the railroads as well within the western territory, because to some extent the conditions must be similar and are similar; so that goes to the question of the reasonableness of the rule, even though it can not be contended that the entire question is open as applicable to all of the railroads within the United States.

The CHAIRMAN. We have from the classifications the rules in respect to shipments of this character.

Mr. SLUSSER. Yes.

The CHAIRMAN. Presumably those rules are observed?

Mr. SLUSSER. Yes. My contention is that it is competent here not only to show what they do in the western territory, but it is 462 competent for this Commission to consider the rules which are now enforced by the railroads within western territory as bearing upon the question of the reasonableness of the note to Rule 5-b.

The CHAIRMAN. I am disposed to let the witness testify, but I suggest that it would be a little more definite if he took up the different classifications or the different territories in which those classifications apply.

Mr. WILSON. I wish to note a formal exception on the part of the Baltimore & Ohio Railroad to the ruling of the Chair. We think that the testimony taken in a case between the intervening petitioners, or the original complainants, and the Baltimore & Ohio Railroad can only refer to a contention between those parties, and that it is clearly incompetent to undertake to establish a record with reference to other railroads, other territories, and other companies, and undertake to have the reasonableness of this rule which these defendants enforce adjudicated against the defendants on such a record.

The CHAIRMAN. The question may be answered and the record may show that the objections stated by Mr. Wilson are interposed on behalf of the several defendants.

463 The question was repeated by the stenographer, as follows:

"Are you able to state, Mr. Peterson, to what extent shipments from various owners are combined into carload lots and shipped on long distance hauls to various parts of the country? I want to know whether it is any considerable portion of the business of your outputs."

Mr. PETERSON. It is rather difficult for me to give an answer to that exactly, because I came away without such necessary information.

Mr. SLUSSER. I do not ask for that, but whether there is a considerable portion of it shipped in consolidated cars.

Mr. PETERSON. There is; yes.

Mr. SLUSSER. Have any of those consolidated cars in years past been shipped within the territory of the Official Classification?

Mr. PETERSON. Yes; they have.

Mr. SLUSSER. What has your association done since the adoption of the note to Rule 5-b in the matter of shipping cars into the territory of the Official Classification?

464 Mr. PETERSON. You mean in the last couple of years? The shipments went on just the same, until, I guess it was, last summer. In the month of June, I think it was, our traffic manager informed us regarding this rule, and to a large extent the shipments in consolidated cars were dropped, but I understand that some shipped in consolidated cars. To a large extent it was dropped.

Mr. SLUSSER. What effect has that rule had upon the smaller shippers?

Mr. PETERSON. It prohibits them from reaching the eastern territory to a great extent.

Mr. SLUSSER. And from competing with the larger concerns?

Mr. PETERSON. Yes; in that territory, in such territory as is covered by the—

Mr. SLUSSER. You still make up consolidated cars for shipment into the western territory, do you not?

Mr. PETERSON. Yes, sir; all the time.

Mr. SLUSSER. How does that affect the smaller shippers in relation to their competing with the large concerns?

Mr. PETERSON. It puts them upon a par, so far as reaching the territory is concerned.

465 Mr. SLUSSER. How are these consolidated cars made up at Rockford—through the intervention of forwarding agents or by a mutual arrangement between shippers?

Mr. PETERSON. To facilitate handling this matter, we have established what we call the Rockford Shippers' Association, and we have warehouses and a manager of that warehouse. The manager notifies the manufacturers the day he has a load for certain points, and they take their goods there between the time of notification and the day of loading.

Mr. SLUSSER. Are you familiar with the practice and manner of loading straight cars for shipment in carload lots, where the ownership is vested in one concern?

Mr. PETERSON. I am.

Mr. SLUSSER. Have you an opinion, based upon your experience, as to which requires the longer service of the equipment of the road—the consolidated cars or the straight cars?

Mr. PETERSON. If there is any difference at all, it is in favor of the consolidated cars, because the man generally always has on hand, when a car is pushed in there, more than enough to make a carload, and he has two or more men in his employ, and they load up a

466 car in very short order. The reason they do not start to load until the goods are all there is because there is a minimum weight to be loaded in each car. Therefore he wants to see all the goods when they start in to load, so as to be able to reach that minimum, because otherwise it is dead weight charged up against us, and by having the goods all there you can get more into a car, because you can find places where small pieces can be placed, whereas larger pieces would not go in there.

Mr. SLUSSER. Does that work to the advantage of the railroads by having a larger weight in the car?

Mr. PETERSON. Well, they have a minimum, and it is 12,500 pounds. Most of our cars go at that. Of course the railroad company charges the weight just the same, if you do not have the minimum.

Mr. SLUSSER. That is, they charge for the excess weight at the regular rate, do they not?

Mr. PETERSON. Yes.

The CHAIRMAN. It is not necessary to go into all those details. He states that if there is any difference in the time of loading and unloading it is in favor of the consolidated shipment, and that
467 according to his observation they usually get heavier loading.

Mr. SLUSSER. Are you familiar with the manner in which claims are made out for damage to goods in transit in consolidated cars, whether by the consignor or the several individual owners?

Mr. PETERSON. I asked the secretary this before leaving home, if there were any damages, to the best of his recollection, and he says that there has never been any damage claim received for any goods shipped in that way, and this is the sixth year of our shipping association.

The CHAIRMAN. Then you do not know how claims are presented in case there is damage?

Mr. PETERSON. No; I asked him if there was any claim and he said to the best of his knowledge and belief there were no claims, neither made nor received.

Mr. SLUSSER. Is there any fact that you wish to bring out as related to your business?

Mr. PETERSON. I am here primarily in the interest of the smaller factories in our association. They feel, and I feel, as a stockholder, that it would be a discrimination against the smaller as in favor of
468 the larger manufacturers, to have this rule enforced. I feel that if it became uniform all over the United States it would bar them to an extent that I could hardly conceive of at the present movement. It would be a great burden on them.

The CHAIRMAN. Under the practice which prevails at Rockford, which you have described, each shipper of the less than carload lots, where the consolidation takes place, gets the carload rate?

Mr. PETERSON. Yes; it is divided up in percentage. That is, the manager of the shippers' association divides up pro rata the cost of forwarding the car.

The CHAIRMAN. That is to say, they all get the carload rate?

Mr. PETERSON. They all get the carload rate.

The CHAIRMAN. There is no division, therefore, of the difference between the carload and the less than carload rate with the shipper?

Mr. PETERSON. No; nothing more than the expense of handling it; each one pays pro rata.

The CHAIRMAN. That is not in the form of a division of the difference?

Mr. PETERSON. No.

469 The CHAIRMAN. You simply assess the expense of conducting this association upon the members in proportion to their shipments?

Mr. PETERSON. That is it.

The CHAIRMAN. The result, therefore, is that every shipper pays exactly the same rate?

Mr. PETERSON. That is it; they are on a par.

The CHAIRMAN. What would you think of a plan under which the difference between the carload rate and the less than carload rate was divided with the shipper, according as the forwarding agent might agree with him?

Mr. PETERSON. That, no doubt, would be a profit to the manufacturer and the shipper—why, he does that. There is often expense of handling. Then we have to have warehouses, and other provisions for handling this, and have to have capital invested in handling those things, and whether we pay for it directly as an individual, or whether we join as an association of course is immaterial. We have joined ourselves into an association together because we thought we could handle it better. We are located close together; but if we were located far apart, it would not be convenient; it would be impossible.

470 The CHAIRMAN. Then what would the small shipper do in competition with you?

Mr. PETERSON. He would be all right, because the amount he would have to pay more than what it costs us would be a very small part; it would not be a great part. The benefit of these carloads, as far as we are concerned, is this: It saves damages. There is a great amount of goods damaged, especially less than carload lots.

The CHAIRMAN. I observe in your testimony you seem to emphasize the immunity from loss quite as much as the saving in the rate.

Mr. PETERSON. That is the way the dealers look upon it. Now, if a dealer gets a piece of furniture that is marred he hardly knows what to do with it. He is not in a position to repair it, and if he returns it to us it is a large expense, and there is a good deal of trouble in the matter of figuring it, and so forth, and if he puts in a claim to us there is apt to arise a misunderstanding between the manufacturer and the dealer, which is very disagreeable on both sides.

471 The CHAIRMAN. Perhaps you did not quite understand the question I asked you a moment ago. At Rockford, as I understand it, you have seventeen concerns.

Mr. PETERSON. Yes.

The CHAIRMAN. And they are all right in one town and near together?

Mr. PETERSON. Yes.

The CHAIRMAN. They can, without much difficulty or expense, bring all their shipments to one common place where they can be loaded into a car up to its capacity, up to the minimum or above it?

Mr. PETERSON. Yes.

The CHAIRMAN. Suppose there is a small manufacturer in a little town ten miles away who wants to ship in competition with manufacturers in Rockford. How is he going to do it?

Mr. PETERSON. He would ship it to us in Rockford.

The CHAIRMAN. He would have to pay the less than carload rate into Rockford?

Mr. PETERSON. Yes. We have to do that. We ship lots of goods to Chicago to be loaded into cars, enough to make carload after carload, every week in the busy season.

472 The CHAIRMAN. Would not the result in such case as I assume be that this small manufacturer, ten or a dozen miles away from you, would have to pay more freight to reach the same markets than you people in Rockford have to pay?

Mr. PETERSON. He would have to pay the difference from his local point to Rockford, yes; whatever that was.

The CHAIRMAN. Or he could ship in carload lots to destination, if that were cheaper?

Mr. PETERSON. Yes. But the history of the furniture manufacturer is that there is a considerable number of them established in the same place. You do not find many places where a factory runs isolated. The per cent of isolated factories is very small. There is difficulty in the way of operating your furniture factory where there is only one—or, in fact, it is the same way with almost every manufacturing business; there is a lot of detail to it where there is only one; and therefore they are generally located where there is more than one.

473 The CHAIRMAN. Yes; I am aware that there are certain peculiarities of the furniture industry which do not obtain in other lines of business.

Mr. SLUSSER. Is there a concern at Rockford known as the Rockford Transfer Company?

Mr. PETERSON. Yes; that is a furniture factory.

Mr. SLUSSER. Have you ever had any experience in consolidated cars through the instrumentality of forwarding agents?

Mr. PETERSON. Yes; I have. That is what I have explained.

Mr. SLUSSER. And at Chicago?

Mr. PETERSON. Yes.

Mr. SLUSSER. You may state what that experience has been—as to whether it is a favorable way of making shipments, or otherwise.

Mr. PETERSON. It has been satisfactory. We generally have to stand the freight from Rockford to Chicago; that is, generally so, although sometimes the man that orders the goods stands it.

Mr. SLUSSER. Have you found that these forwarding agents that have handled your product have charged substantially a uniform fee for the services rendered in packing, consolidating, and shipping the cars?

474 Mr. PETERSON. There is an established rule, about so much for each car.

Mr. SLUSSER. That is for the service of consolidating and packing and shipping the car?

Mr. PETERSON. So I have understood.

The CHAIRMAN. But they are under no obligation to make the net charge uniform?

Mr. SLUSSER. They are, so far as agreement with them is concerned. The CHAIRMAN. But they are not obliged to make any such agreement?

Mr. SLUSSER. Not that I know of.

The CHAIRMAN. They are not obliged to take it for you unless they choose?

Mr. SLUSSER. Not that I know of.

The CHAIRMAN. They could take from your competitors, and give them the advantage of the carload rate, and refuse to make that arrangement with you, could they not?

Mr. PETERSON. As far as I know, they could; I am not familiar with the details of their business.

Mr. SLUSSER. In other words, they stand in the same relation to the owner of the goods that a line of drays would stand to the public?

55 Mr. PETERSON. Take it in Chicago. They are a necessity.

The railroad company can not handle it, and we can not handle it; we can not go in there and make an arrangement every time. So of course we ship it to such and such a forwarding agent. There are several in there that do that work. I think they all have about the same rate.

Cross-examination:

Mr. WILSON. Where is Rockford located?

Mr. PETERSON. It is about 85 or 88 miles west of Chicago.

Mr. WILSON. On what railroad?

Mr. PETERSON. On the Northwestern, the Illinois Central, the D. B. & Q., the I. I. & M., the St. Paul—five railroads.

Mr. WILSON. It is not on the line of any of the defendants in this case, namely, the Nickel Plate, the D., L. & W., the Wabash, or the C. & O. railroads?

Mr. PETERSON. No, sir.

Mr. WILSON. Have any of these shipments that you have been describing, where you assembled carloads at Rockford, been over the line of any of these defendant companies?

66 Mr. PETERSON. I think so; they might have been.

Mr. WILSON. Originating on the lines of any of these defendants at Rockford?

Mr. PETERSON. No.

Mr. WILSON. By saying you think so, they might have been—

Mr. PETERSON. Might have been connecting lines.

Mr. WILSON. In shipments eastbound?

Mr. PETERSON. Yes.

Mr. WILSON. But you do not know that of your own knowledge?

Mr. PETERSON. No.

Mr. WILSON. Well, have you been talking about shipments into official Classification territory or into Western Classification territory?

Mr. PETERSON. We ship more than half of our goods east of Chicago.

Mr. WILSON. To what market?

Mr. PETERSON. The largest market is New York City and vicinity; that is the largest furniture market in the world.

The CHAIRMAN. Rockford is in Western Classification territory, is it?

477 Mr. PETERSON. Yes.

Mr. SLUSSER. If you will permit me to state, I understand the rule is interpreted and enforced in this way, even though the shipment originates in western territory. If it is for delivery in official territory, the note to Rule 5-b is enforced.

Mr. WILSON. You said you shipped most of it to New York City.

Mr. PETERSON. No; I said that that is the largest furniture market, that is the largest shipment to any one place.

Mr. WILSON. Are you a manufacturer yourself?

Mr. PETERSON. Yes, sir.

Mr. WILSON. What is your concern?

Mr. PETERSON. The Union Furniture Company.

Mr. WILSON. Is it a large concern or a small concern?

Mr. PETERSON. A small or medium size concern.

Mr. WILSON. What is your capital?

Mr. PETERSON. Two hundred thousand dollars.

Mr. WILSON. In your shipping into this eastern territory, east from Chicago, after the goods go to Chicago from Rockford, have you used a forwarding agent?

478 Mr. PETERSON. Do you mean in Rockford?

Mr. WILSON. No; in Chicago.

Mr. PETERSON. No; in shipping east we might, on isolated cases, although I do not recall it now; we might have done it on isolated cases.

Mr. WILSON. How do you ship, then?

Mr. PETERSON. We have established our own association there to assemble cars.

Mr. WILSON. But do you ship into Official Classification territory in those assembled cars?

Mr. PETERSON. That is, east of Chicago?

Mr. WILSON. Yes.

Mr. PETERSON. Yes.

Mr. WILSON. You do that in the face of the note to Rule 5-b?

Mr. PETERSON. I was explaining in the early part of my testimony that our traffic manager informed us, I think in June, that it was against the rules of the company, and so on, and since then that lessened the shipments east. I am not familiar with the extent to which it has lessened the shipments.

Mr. WILSON. Do you come here as a representative of this association at Rockford?

479 Mr. PETERSON. I come here as a representative of the furniture manufacturers.

Mr. WILSON. You do represent this association, do you not?

Mr. PETERSON. I do; yes.

Mr. WILSON. You come here and say you do not know the details of the recent shipments of your association, that is the shipments for the past year, but you have testified with great exactness and detail with respect to shipments of several years ago. Is that correct?

Mr. PETERSON. I do not state, except in a general way, about any shipments. Several years ago, you say. I do not state about those shipments, except in a general way. I came off without getting the necessary data, but in a general way I could tell about them.

The CHAIRMAN. Do you know of any instance, or has there been any instance within your knowledge, say within the last six months, in which this assembling of less than carloads has taken place and shipments made into eastern territory at carload rates?

Mr. PETERSON. I should decline to answer that.

Mr. JENNEY. They do do it every day. They have not stopped that at all. What they do is simply to evade the rule by having it sent in a through car from Rockford in the name of one of their customers.

Mr. SLUSSER. The gentleman makes an elegant argument in favor of the proposition that it does not cost the railroad companies any more money to have goods shipped in carload lots, because they do not know anything about it unless they find it out by inquiry. But as a matter of fact, whether this witness or his associates have done that or not, it seems to me, is not a question of official inquiry at this time. The reasonableness of the rule is challenged. I do not think we ought to go to the extent of inquiring whether a shipment has been made within the time of the so-called rule being in force.

Mr. WILSON. One of the objections on the part of the railroad company to the introduction of the forwarding agent is the temptation to underbilling, false billing.

Mr. PETERSON. The manufacturers at Rockford consider that rule illegal and unjust. They have talked of carrying it up to the Supreme Court. They think it is an illegal combination of railroads. It is a combine of the railroads as against the manufacturers, and we will resent it to the limit.

481 Mr. WILSON. Although you may regard this rule as illegal and unjust, nevertheless, it being a part of the published tariffs, what attitude does your company take with respect to the observance or breach of the rule?

Mr. SLUSSER. I object to that.

The CHAIRMAN. He need not be required to answer that.

Mr. WILSON. He has not refused to answer it yet. Let the record show, if that is the ruling of the chairman, that the witness refused to answer.

The CHAIRMAN. He has refused to answer.

Mr. PETERSON. I will state that the association has not taken any part that I know of; they have not passed upon the proposition.

The CHAIRMAN. Do you understand what the rule is?

Mr. PETERSON. Yes.

The CHAIRMAN. I will ask again. Do you know of any instance, say within the last six months, in which that rule has been disregarded or evaded?

Mr. PETERSON. Within the last six months?

The CHAIRMAN. Yes.

Mr. PETERSON. I would decline to answer that.

Mr. SLUSSER. Enter our objection to that question.

Mr. JENNEY. You say it is your practice now to send 482 furniture to Chicago, and in some cases a part of that furniture may be delivered in Chicago and the balance of it goes to forwarding agents to be assembled with other freight for western shipment. Is that right?

Mr. PETERSON. Yes, sir.

Mr. JENNEY. Who makes the bargain with the forwarding agent—the furniture association or the individual dealers at Rockford?

Mr. PETERSON. We get instructions from the man who orders the goods.

Mr. SLUSSER. To make the deal for him?

Mr. PETERSON. No; we just say, "You ship to Mr. Welling, or the Morgan Forwarding Company, the International Forwarding Company, etc."

Mr. JENNEY. Does the purchaser of the furniture make the deal with the forwarding agent?

Mr. PETERSON. I assume so. There is a schedule of prices. I would judge that there is a schedule of prices. I would judge that there is a schedule of prices established, although I am not familiar with that.

Mr. JENNEY. Have you ever made any contracts with forwarding agents?

Mr. PETERSON. Not that I can remember of.

483 Mr. JENNEY. Are you familiar with their practice in Chicago?

Mr. PETERSON. In a general way. They assemble goods and load the car.

Mr. JENNEY. You are familiar with the fact that whenever they assemble goods and load the car they ship the car on a carload rate, are you not?

Mr. PETERSON. Yes; I presume so.

Mr. JENNEY. And that they assemble less than carload shipments, is that right?

Mr. PETERSON. Yes. They receive goods from us in less than carload lots.

Mr. JENNEY. Do you know whether or not the shipper of those less than carload shipments pays less than carload rates?

Mr. PETERSON. I do not know anything about that.

Mr. JENNEY. Do you know whether or not, since you say the traffic manager of your association advised you of the Rule 5-b—whenever that may have been—do you know whether or not your shippers'

association have continued to assemble, combine, and consolidate the shipments of different furniture manufacturers to ship into 484 trunk line territory and, instead of your former practice—

Mr. PETERSON (interrupting). You mean if I have any personal knowledge of any car or cars going that way and being assembled into that territory?

Mr. JENNEY. Yes.

Mr. PETERSON. No; I have not.

Mr. JENNEY. Do you know that what they have done is simply to ship that in the name of one of the factories as owners?

Mr. PETERSON. No; I could not say that.

Mr. JENNEY. You do not know whether they have or not?

Mr. PETERSON. No.

Mr. JENNEY. In otherwords, that load is assembled by your association, and in the same way as before, instead of being shipped as formerly it is now shipped by one of the factories as owners, and in that way the rule has been evaded?

Mr. PETERSON. I could not say that it was discussed at the time our traffic manager notified us, and that was before the fall season 485 commenced; I think it was in the month of June this year—it was commented on very severely and so on—that the smaller factories could not load cars, and it has practically barred them out of the eastern territory this season; but whether any cars have been made up that way, I do not know. I could not say there have been and I could not say there have not been.

Mr. JENNEY. Another question, Mr. Peterson. Do the railroads going out of Rockford place for the service of shippers through cars in which the railroads themselves combine L. C. L. freight and ship through to destination?

Mr. PETERSON. They ship through from Rockford to Chicago.

Mr. JENNEY. Suppose you want a car for New York. Will not the railroads give you a through car?

Mr. PETERSON. Certainly, they will give you a through car if you will load it yourselves.

Mr. JENNEY. But if you want to pay L. C. L. rates and a lot of them combined to the shipping station of your railroad, sent your furniture there, the railroad would give you a through car to New York, and they themselves will load it.

486 Mr. PETERSON. If we furnish enough to make a car, yes.

Mr. SLUSSER. Under one ownership?

Mr. PETERSON. No; that would be L. C. L.; it would not be under one ownership then.

Mr. JENNEY. So, so far as the benefits to be obtained from the consolidating of your L. C. L. shipments and shipping through to destination in through cars is concerned, the railroads will give you that service provided you pay L. C. L. rates, will they not?

Mr. PETERSON. I could not say as to that; it has never been requested.

Mr. JENNEY. You have not any doubt about it, have you?

Mr. PETERSON. I should not think so.

Mr. JENNEY. Then, what your proposition really comes down to is that a lot of you who are L. C. L. shippers want to get the benefit of carload rates?

Mr. PETERSON. Certainly; that is the only way we can reach. How can we compete with the manufacturers in New York City, say a thousand miles away, unless we can get that minimum cost.

You take furniture. It goes at a high rate L. C. L. The 487 charge is so heavy that it bars us from reaching the market.

Mr. JENNEY. I understand the reasons for it, but what you really come down to is that all the gentlemen who have l. c. l. shipments are not willing to ship their goods in that way.

Mr. SLUSSER. I object to the expression l. c. l., because it really does not mean less than carload shipments; he is referring to carload shipments.

Mr. JENNEY. But that is the position you take.

Mr. PETERSON. What is that?

Mr. JENNEY. You gentlemen who ship ordinarily less than carload lots want the benefit of carload rates.

Mr. PETERSON. Yes, and also we want to load it ourselves. If we leave it to the railroads to load, they will load it as they load trunks. We load it ourselves, and we unload it.

Mr. JENNEY. If you gentlemen get the benefit of carload rates, is there any reason why the rest of the l. c. l. shippers should not get carload rates?

Mr. PETERSON. Not that I know of.

488 Mr. JENNEY. If by reason of their living near together they are able to get carload rates, should not others who live at other places get a carload rate?

Mr. PETERSON. I think so.

Mr. JENNEY. So eventually there would be no differences between the carload and the less than carload rates.

Mr. PETERSON. Whenever there is one consignor and one consignee I think they ought to have a carload rate.

Redirect examination:

Mr. SLUSSER. How are your goods shipped—f. o. b., or freight collected at point of delivery?

Mr. PETERSON. At the larger places we sell at the point of delivery. We charge 95 cents a hundred for storage or delivery in New York City. Our carriers to New York City deliver our goods at the stores.

Mr. SLUSSER. Do you know whether it is the practice of the railroads on l. c. l. shipments to require freight to be paid in advance or otherwise?

Mr. PETERSON. I do not know about that.

489 Mr. JENNEY. You do know, do you not, that as a matter of practice with the railroads, that an l. c. l. shipment is subject to transfer en route, particularly where it is delivered to a connecting carrier, and to a greater extent than a full carload shipment?

Mr. JENNEY. I object to that, because that is not a correct statement of facts.

Mr. SLUSSER. I am asking if the witness knows.

Mr. JENNEY. If it is to our roads, I have no objection, but the question was asked applying to roads generally.

Mr. SLUSSER. Any road within the official territory.

Mr. WILSON. We object to that.

The CHAIRMAN. Let us see what he does know.

Mr. PETERSON. The general information is that it goes to Chicago, and then it is unloaded there and transferred to the different roads, wherever it is going. Further than that, I know nothing, only that it takes a lot of time for the goods to reach destination sometimes.

Mr. SLUSSER. What has been your experience in l. c. l. as against l. c. shipments in point of time, reaching their destination?

Mr. PETERSON. Carload shipments always go through much faster than smaller shipments.

490 Mr. CLARKE. What is the name of the general manager of the Rockford Manufacturers & Shippers Association?

Mr. PETERSON. John M. Allen.

Mr. CLARKE. And has he been general manager during the last six months?

Mr. PETERSON. Yes.

Mr. CLARKE. Is he here?

Mr. PETERSON. No; he is dead.

Mr. CLARKE. Who is managing it now?

Mr. PETERSON. The secretary of the company, Mr. Branahan; Mr. Gregory has been elected for the position.

Mr. CLARKE. And how long has he been serving?

Mr. PETERSON. He has not really started yet.

Mr. CLARKE. How long since Mr. Allen died?

Mr. PETERSON. About a month.

The CHAIRMAN. I do not understand about the payment of the freight. Is this furniture at Rockford mainly sold delivered?

Mr. PETERSON. It is in New York City and those large eastern points. We deliver it at the stores.

The CHAIRMAN. How about other points?

Mr. PETERSON. At other points they generally unload, themselves; but some points—you take out West.

491 The CHAIRMAN. I want to find out whether you pay the freight or the consignee pays it.

Mr. PETERSON. We pay the freight and charge it up to the consignee.

The CHAIRMAN. Do you pay it in advance?

Mr. PETERSON. Yes; we have to pay the cars in advance.

The CHAIRMAN. Do I understand that ordinarily the freight rate on furniture is paid in advance at the point of origin?

Mr. PETERSON. Yes. We generally pay the freight because we have forwarding agents in New York City. Of course they do not want to pay the freight—that is, we do not ask them to pay it any-

way, and we pay them for handling the goods, and the goods are ours until they get into the stores or are delivered at the doors of the stores. They call it store-door delivery.

The CHAIRMAN. The railroads do not make that delivery?

Mr. PETERSON. No. We have forwarding agents—what are called forwarding agents. We have them do it.

492 Mr. WILSON. Who are your New York forwarding agents?

Mr. PETERSON. I do not recall who they are; there are several of them. I do not have those things in my mind. My work is quite numerous, and those details are left to clerks and assistants. Warwick & Thompson, in New York, is one firm.

Mr. WILSON. Can you give the name of any other?

Mr. PETERSON. Another one is Byrd.

Mr. WILSON. Do you remember any others?

Mr. PETERSON. No; I do not. My duties are such that I do not have time to know about these things, but I know that Warwick & Thompson is one firm; and also Byrd.

DAVID R. WOOD, a witness of lawful age, called by and on behalf of the interveners, after being first duly sworn, testified as follows:

Mr. SLUSSER. What is your business?

Mr. WOOD. Assistant traffic manager for the Otis Elevator Company.

493 Mr. SLUSSER. What are your duties in relation to the shipment of freight from Chicago and the territory east of Pittsburgh?

Mr. WOOD. I have charge of the traffic department of the company in what we call Chicago territory; that is, territory west of Pittsburgh, Pittsburg to the Pacific coast, and from Canada to Mexico.

Mr. SLUSSER. The Otis Elevator Company is the largest concern of its kind in the country?

Mr. WOOD. Yes.

Mr. SLUSSER. Or perhaps the world. Can you estimate approximately the number of shipments you make daily from Chicago, in carload lots or otherwise?

Mr. WOOD. I should say we load on an average of about three carloads, straight carloads, a day; and in addition to that we make, perhaps, eight or ten L. C. L. shipments, aggregating anywhere from fifty pounds up.

Mr. SLUSSER. These L. C. L. shipments are made within what territory; in the territory indicated?

Mr. WOOD. Between Pittsburg and the Pacific coast.

Mr. SLUSSER. Do you have occasion to consolidate with other owners any of your shipments?

Mr. WOOD. We do.

494 Mr. SLUSSER. And to what extent do you follow that practice?

Mr. WOOD. Do you refer to the territory covered, or to the amount of tonnage?

Mr. SLUSSER. To the amount of tonnage.

Mr. Wood. Well, it is small as compared to the aggregate of our business.

Mr. SLUSSER. Will you indicate the number of shipments that you consolidate?

Mr. Wood. I should say about two or three a week—three a week, probably.

Mr. SLUSSER. And where do those shipments go?

Mr. Wood. They go mostly to Pacific coast points and points west of Denver.

Mr. SLUSSER. And how do you ship L. C. L. shipments into the eastern territory?

Mr. Wood. In the regular way, through the freight houses of the different lines.

Mr. SLUSSER. Which method do you find preferable in your business—the combination in carload lots with other owners or the shipments L. C. L. by the railroads through the freight houses?

495 Mr. Wood. That would depend, as I have indicated, to some extent, on the distance of the shipments. To points that are comparatively isolated, we have not made any attempt to consolidate with other shippers, but on long hauls we find it to our advantage to use the forwarding agents.

Mr. SLUSSER. Will you kindly state in what way it is to your advantage?

Mr. Wood. We find it to our advantage, I might say, primarily, on account of the rates. For instance, to points on the Pacific coast, on L. C. L. shipments, we would be obliged to pay, in order to avail ourselves of the carload rate, for what we would call dead weight. In other words, we have to pay 24,000 pounds, paying for the transportation of considerable weight we do not have. Otherwise we would be obliged to pay \$3 per hundred, first-class rate. Our rate is high-class, first-class. We would be obliged to pay the first-class rate of \$3.00 a hundred on actual weight. By consolidating these shipments with other shippers the machinery secures the benefit of the carload rate for the actual carload shipment, plus what we 496 pay the forwarding company for their services in handling the shipment.

The CHAIRMAN. What is that difference; what is the L. C. L. rate?

Mr. Wood. The L. C. L. rate is \$3.00.

The CHAIRMAN. What is the C. L. rate?

Mr. Wood. \$1.40.

The CHAIRMAN. Proceed.

Mr. Wood. I might mention a case, to illustrate it. A day or two before I came here we had a shipment for Los Angeles, California, of 7,000 pounds. We could not afford to make that shipment at L. C. L. rates. We billed it as a carload shipment, at a carload rate of \$1.40. We would have had to pay for 24,000 pounds at L. C. L. rates, which would have cost us \$336, I believe. We gave that shipment to a forwarding company, and we paid them \$1.40, which they

paid the railroad company for the freight. We paid them fifteen cents a hundred for handling, for their services; so that it aggregated altogether \$263.50. That was a net saving to us of \$72.50 on that shipment. That, I think, will illustrate my point in regard to the advantage of the difference in charges. We find, in
497 addition to that, this advantage in point of time: Less than carload shipments to long distances are very apt to be subject to transfer at the terminal points of the different railroads, and that involves a loss of time. It also involves difficulty in tracing those shipments. It is a good deal more difficult to trace a L. C. L. shipment than it is to trace a carload shipment. The railroads have served notice that they will not attempt to trace L. C. L. shipments unless it can be shown that the shipment has been subject to an unreasonable delay. Our business is all sold, or practically all, on contract, by which we contract with the owner of a building in St. Louis, or St. Paul, or Denver, or Seattle to furnish and install an elevator in his building at a certain time, or by a certain time. I might say, in regard to this, that our business is manufacturing and the installation of freight and passenger elevators all over the world, but principally in the United States. We make a contract to install an elevator in a building at a certain time, and, as a rule, these shipments are made in carloads, as I have indicated. We cannot
498 form any inflexible rule as to the weight of an elevator shipment, owing to the difference in the style and construction of different elevators, and the requirements; but, in an ordinary sense, I might say that the elevator outfit complete will make a carload; not always a maximum carload, but sometimes less than the minimum, and if we are making a shipment a long distance by L. C. L. it is difficult, sometimes, to trace those shipments. They may lose the identity of the cars at transfer points. We can get no returns. We have a man at destination, an erecting foreman, waiting for that material. If it does not get there, the owner is dissatisfied and we cannot erect the elevator—we cannot install it and complete it in the time that we agreed to install it. We cannot locate that shipment. We find we can secure better results in that respect by consolidating with other people and getting our shipments into a carload that goes direct to destination.

The forwarding agents, if required to do so, will trace that car and report it on arrival, so that we know our material is there.

We do a very considerable business for the United States
499 Government. We erect elevators for the Government in a great many public buildings, and in their contracts they almost invariably insist upon a time forfeiture clause. That means unless the elevator is installed by a certain date that the Government will exact a penalty from us of fifty dollars or forty dollars, or whatever it is, a dollar for each day that the elevator remains uncompleted and not ready for use. That makes it essential that we should be on time.

Then, again, we find this in regard to forwarding agents: In all our experience with the forwarding agents, covering a period of

some three years, we have never yet had occasion to make a claim for loss or damage. I have had charge of those claims during that time and I know that to be a fact; we have never had a claim on any shipment forwarded by a forwarding agent. We do have a great many claims on L. C. L. shipments through the railroads. We had a little shipment the other day going to Huntley, Ill. It was a shipment to the Borden Condensed Milk Company, on the Northwestern Railroad. The Northwestern Railroad has a receiving station just 500 a block from our works, and the shipping agent delivered that machine to them at that receiving station. They took it there and loaded it and transferred that car to their station, about a mile away, and there it was transferred and went out. The shipment went to Huntley, and on arrival the consignee called us up and said that the machine was there, but damaged. They asked what they should do about it. I told the agent to receive it, stating on his receipt that it was received in bad order. When our erection man arrived I said he would determine what parts it was necessary to replace. He replied that the waybill showed that it was received in bad order at the Wood Street Station. I said, "All right; receipt for it as being received in bad condition," and he did that. When the papers came in to me I noticed the papers showed that it was received in bad order. Now, we delivered it at Ashland avenue, and in going the first mile the railroad company broke that machine. That means they loaded it in a car with other goods and in some way broke it. We have got a claim against the Northwestern Railroad for that machine.

Mr. SLUSSER. In shipping into the territory of the Official 501 Classification, where these railroads operate that are parties in this proceeding, you frequently have to use these railroads, do you not?

Mr. WOOD. Yes.

Mr. SLUSSER. And you send them L. C. L.?

Mr. WOOD. Yes, sir.

Mr. SLUSSER. Do you, to any extent, have goods damaged in transit in that way?

Mr. WOOD. We do occasionally; yes.

Mr. SLUSSER. And do they go through as promptly as they would go through if they were shipped C. L. in combination with other goods, if they are going a considerable distance?

Mr. WOOD. I do not think they do. I think, for instance, we had a carload going to Cleveland, or Cincinnati, or Columbus, that if we could load a straight carload and consign it to ourselves there, we could receive it quicker than if we would send it to the freight house and send it through the railroad company.

Cross-examination:

Mr. WILSON. You ship, or have knowledge of the shipment of your company, only as far east as Pittsburg?

502 Mr. Wood. Yes; all under my jurisdiction.

Mr. WILSON. These shipments you have been speaking of and the general shipments you have had in mind when making these general statements—were they mostly western or southern shipments?

Mr. Wood. Do you refer to the consolidated shipments?

Mr. WILSON. You gave general testimony about all shipments.

Mr. Wood. Well, we cover all that territory. Of course, the territory west of Chicago is larger than the territory east of Chicago; of course the territory between us and San Francisco is a good deal larger than the territory from Pittsburg to the Atlantic coast. Consequently the bulk of our shipments go west.

Mr. WILSON. And in talking about these consolidated shipments you have been talking about shipments west of Chicago?

Mr. Wood. Yes, sir.

Mr. WILSON. You do not use the forwarding agents east of Chicago?

503 Mr. Wood. We have not done so, for the reason that it is short distance, and we have not considered it for our benefit sufficiently to take advantage of it. Another point is that some of those shipments are to isolated points and possibly there would be no carload of machinery going there. We could not classify them with household goods or furniture, and we have not taken up a contract on those short hauls east of Chicago. We have not tried to consolidate our machinery with other machinery; that consolidation has been confined to long-distance hauls.

Mr. WILSON. In other words, there is not the scope for the forwarding agents?

Mr. Wood. Not in our business.

Mr. WILSON. The business of the forwarding agent would be limited to certain territories and between certain centers, would not, naturally?

Mr. Wood. So far as our experience has been, it has been, yes.

Mr. WILSON. So, when the advantage in rates, which you said was the primary advantage, is taken into consideration, even in your business, it would seem that people who would get the benefit 504 would be the consumers at certain localities, and that in certain other localities, to which you ship necessarily L. C. L., those consumers would have to stand the L. C. L. rates, would they not?

Mr. Wood. No; because we are the shippers and owners until the machinery is installed in the building; it falls on us, not on the consumers to pay.

Mr. WILSON. Would it not come in the final price to the consumer?

Mr. Wood. No; because that price is fixed when the contract is made.

Mr. WILSON. But would not the contract be made in the light of the freight rate?

Mr. Wood. To some extent, yes.

Mr. SLUSSER. You have competition in the extreme West?

Mr. WOOD. Yes; we have to figure against competition there. Take these L. C. L. shipments we load in consolidated cars. On small elevator outfits that would not make a carload we would be practically shut out there as against the local competitor if we had to ship C. L.

Mr. SLUSSER. And the railroad would lose the tonnage?

Mr. WOOD. The railroad would lose the tonnage; yes.

Mr. WILSON. But I understood you to say that as far as you concerned, your consolidations were only a small part of your shipments, a small proportion?

Mr. WOOD. Yes, sir.

Mr. WILSON. You said you would consolidate two and three times a week, perhaps?

Mr. WOOD. Yes.

Mr. WILSON. And that on the other hand your L. C. L. shipments could move—

Mr. SLUSSER. His C. L. shipments.

Mr. WILSON. Your L. C. L. shipments, I thought you said.

Mr. WOOD. I referred to both, I think.

Mr. WILSON. So when you are talking about having more claims on L. C. L. business, of course you also mean to qualify that by saying that you have a great many more of those shipments than L. C. shipments?

Mr. WOOD. Yes; but, understand, we had not any claims in C. L. shipments.

Mr. WILSON. You had been doing business there for a number of years—

Mr. WOOD. With the forwarding companies for about three years. We have been doing business for a number of years.

Mr. WILSON. But of course your volume of business in L. C. L. shipments would be very much larger.

Mr. WOOD. The number of such shipments is undoubtedly larger.

Mr. WILSON. Now, you pay your forwarding agent a certain fixed price, do you?

Mr. WOOD. Yes.

Mr. WILSON. For his physical work?

Mr. WOOD. Yes.

Mr. WILSON. What would you have to say of the situation if, instead of being able to make that sort of an arrangement, the forwarding agent would undertake to charge you somewhat less than the L. C. L. rate but would not give you as beneficial a rate or as good a rate as the fifteen cents and the carload rate—

Mr. WOOD. I do not understand.

Mr. WILSON. If you ship an L. C. L. shipment you pay the L. C. L. rate.

Mr. WILSON. And the C. L. shipment you have to pay a C. L. rate on?

Mr. WOOD. Yes.

Mr. WILSON. There is a wide difference between the two. If you take an L. C. L. shipment, say five thousand pounds, or any other amount less than the minimum, to a forwarding agent, and he declines to make an arrangement by which he will charge you the carload rate plus 15 cents per hundred for taking that, and wants to charge you somewhere between the C. L. rate and L. C. L. rate, and will make a better division with some other shipper, what have you to say about that as a proper and reasonable means of carrying on a freight business?

Mr. WOOD. I do not know, in the first place, what they would do with some other shipper, but self-preservation is the first law of nature, I think. I would figure it out and see whether there was any economy to the elevator company in doing business with that man or not.

Mr. WILSON. Under the circumstances, you would be in the dark as to what your competitors were doing, and you would be constantly figuring with different forwarding agents to get the best deal 508 you could on those consolidated shipments.

Mr. SLUSSER. I object to that question. The witness has said he pays a fixed fee for handling the goods.

The CHAIRMAN. But Mr. Wilson is asking him what his opinion would be if that were done.

509 Mr. WILSON. Well, the L. C. L. rate to the Pacific coast is \$3.00.

Mr. WOOD. Yes.

Mr. WILSON. Your C. L. rate is \$1.40?

Mr. WOOD. Yes.

Mr. WILSON. There is \$1.60 a hundred pounds difference.

The CHAIRMAN. Now, if this forwarding agent may come in between the shipper and the carrier, he is subject to no law; he publishes no tariff, he gives no notice of his charges. He may take your traffic at \$1.40 plus fifteen cents, and he may charge me \$1.40 plus forty-five cents or plus fifty cents, or he may refuse to take mine at all. Is not that so?

Mr. WOOD. I presume that is so.

The CHAIRMAN. Is that a desirable condition?

Mr. WOOD. The point, as I understand it, is this: It is optional with us to do business with him or to comply with the tariffs of the railroad company. I look at it in this way: If we made that 17,000 pound shipment to Los Angeles as a carload, we are paying the railroad company for carrying seven thousand pounds of freight 510 that it did not carry at all, and paying them \$1.40 a hundred for it. I do not see any justice in that; but, on the other hand, we put it in shape where it is tendered to them as a carload of 24,000 pounds or more, and then they carry what they are paid for carrying and get their tariff rate for doing it.

The CHAIRMAN. Yes; but the difficulty in my mind is that if the forwarding agent may come in and divide with the shipper the dif-

ference between the carload and the less than carload rate, each shipper actually pays according to the bargain he can make with the forwarding agent. Of course, each shipper has his choice between the best bargain he can make under those circumstances with the forwarding agent, and shipping at either L. C. L. rates or shipping less than the minimum at carload rates, and paying on a minimum which goes at the carload rate.

Mr. WOOD. Is there a question before the witness?

The CHAIRMAN. I do not think there is.

Mr. SLUSSER. May I inquire, Mr. Wood, if it is not considered by you and your house that the matter of the expense of delivering your goods to the railroad company for carriage is a matter 511 of private concern, as to whether you have a siding to your warehouse and load your stuff directly into your car, or whether you will have it hauled by drays or wagons, or employ the services of a forwarding company; and that you are at liberty to adopt any of those methods that seems to be of best advantage?

Mr. JENNEY. I suppose that is argument.

Mr. SLUSSER. I was trying to follow up the suggestion of counsel.

Mr. WILSON. Whether the freight rate he pays is a private matter, there may be something to say as to that.

Mr. SLUSSER. You do understand that it is your company that pays the freight rate on less than carload shipments, that you pay according to your weight a proportionate share of the freight rate from the point of origin to the point of destination, and that you simply pay the forwarding agent as a forwarder for shipping the goods.

Mr. JENNEY. I think the witness ought to be asked a question, instead of counsel making a leading statement.

512 The CHAIRMAN. He has stated what he does. They pay the C. L. rate plus fifteen cents a hundred pounds.

Mr. JENNEY. Just for the service of handling.

Mr. SLUSSER. Whatever it is for, he pays it.

The CHAIRMAN. And that without reference to the destination?

Mr. WOOD. Yes.

The CHAIRMAN. You have a flat rate of fifteen cents?

Mr. SLUSSER. For handling?

Mr. WOOD. Yes.

Mr. SLUSSER. And you do not know that there is any discrimination made by the forwarding agent at Chicago between one shipper and another?

Mr. WOOD. I never have learned that there was.

Cross-examination:

Mr. JENNEY. Mr. Wood, you say you have been dealing with these forwarding agents for some two or three years?

Mr. WOOD. I don't know exactly how long; about that time.

513 Mr. JENNEY. Do you personally arrange with the forwarding agents for these shipments?

Mr. Wood. Yes.

Mr. JENNEY. So that you personally have full knowledge of the terms between your company and the forwarding agents?

Mr. Wood. Yes.

Mr. JENNEY. What different forwarding agents have you used or made contracts with during those three years?

Mr. Wood. We have used only one. We have figured with others, but have confined our transactions to one.

Mr. JENNEY. What one?

Mr. Wood. The Transcontinental Freight Company.

Mr. JENNEY. What other ones have you figured with?

Mr. Wood. The Export Shipping Company, I think, and the Alfred H. Post Company, if I remember—possibly one other; I don't recall.

Mr. JENNEY. Now, just tell us what you mean by figuring with those forwarding agents?

Mr. SLUSSER. I want to make an objection, and would like to 514 make it specifically, that the charges made by the forwarding agent, which appears here to be simply the vehicle through which shipments are assembled and tendered to the railroad company, is a matter that it seems to me is not at issue in this hearing at all. That is a matter of private contract. These people are not under this law, they are not amenable to it; and under the interpretation of the English law it was held, as a matter of law, that a forwarding agent or intercepting carrier, even though they were common carriers in England, was entitled to precisely the same rates that a private owner was entitled to, because they were permitted to ship consolidated cars; and where the shipment is in the name of the forwarding agent as consignor, they stand in precisely the same relation to the railroad companies that the private owner does; and that is a question of law; and it seems to me that therefore the question of the eminent counsel here is pertinent to the hearing.

Mr. JENNEY. My understanding is that that is a question which the Commission would like to have light on, in order to determine as to the wisdom of recognizing forwarding agents, as to what 515 the practice is, and what will be the effect of what they are doing, and that is the reason why I am conducting the present examination of the witness.

The CHAIRMAN. He may answer.

Mr. JENNEY. What do you mean—what has been the transaction—when you say you figured with these different forwarding agents?

Mr. Wood. As I recall, this transaction was simply this: That in my business I am solicited frequently by the representatives of different railroad companies, express companies, and forwarding companies for a share of our business. When I spoke of those forwarding companies figuring with me, I meant that their representatives called on us at different times and asked us for a share of our business, and they quoted rates to me.

Mr. JENNEY. Let me understand—just let me interrupt you a minute; they would ask you whether you did not have an L. C. L. shipment of freight for this, that, or the other territory, and if you said you had, they said to you, "Why, let us quote a rate on that," and they would quote you a rate on that. Is that the way they 516 did business?

Mr. SLUSSER. I object to counsel stating what they did. I think the witness ought to be allowed to state it in his own way.

The CHAIRMAN. It does not matter much what has been the nature of the interview.

Mr. Wood. I was about to say that in the course of our business the representatives of these different concerns came to me and solicited a certain share of our business, and would ask if we had anything going to Pacific coast points. We would say, "We have not anything to-day, but we may have next week." They would say, "We are going to have a car for such a place on such a day; we will be glad to serve you." We would ask, "How much will you charge us for that service?" My recollection is that the charges have been uniform. Yes; I think I may say positively that whenever they have named a charge for that service it has been uniform. I think my reply has always been to them that we were doing business with one company, all the business we had of that kind, which was not very considerable; that the service was satisfactory; that the relations 517 had been pleasant; that in view of all that, in the absence of any advantage to be gained, I did not see how we could consistently make any change; and I have already stated that all we have done has been done with one company. Those are the conditions and the reasons why.

Mr. JENNEY. You started in to say that they would quote you rates. Did you mean that?

Mr. Wood. What I mean to say is what I explained just now. I would ask them how much they would charge us for such service, and the charges were the same as we were already paying.

Mr. JENNEY. Well, now, you understand my question. For instance, you have a shipment for San Francisco or Los Angeles, and you ask the forwarding company to take that shipment for Los Angeles. Do they quote you a rate on that?

Mr. Wood. No, sir; I do not look for any rate, sir.

Mr. JENNEY. Do you give that to them without making any bargain as to what you shall pay for that shipment?

Mr. Wood. I knew just what we were paying.

Mr. JENNEY. Just answer my question. Did you give your 518 freight to them without making any bargain as to what you should pay?

Mr. Wood. A specific bargain for that individual shipment?

Mr. JENNEY. Yes.

Mr. Wood. No, sir.

Mr. JENNEY. You delivered that freight to them without having any talk with them as to what you should pay for that particular shipment? Is that right?

Mr. Wood. I did not name a price, nor they did not, on that particular shipment.

Mr. JENNEY. What do you mean by naming a price?

Mr. Wood. A price for their service.

Mr. JENNEY. A price that they would charge for carrying it?

Mr. Wood. No; we know what the price of carrying it is. They cannot name the price.

Mr. JENNEY. Did they name a price for which they would carry that stuff?

Mr. Wood. That particular one?

Mr. JENNEY. Yes.

Mr. Wood. They have named a price to me on general terms
519 on all those shipments. I do not go to them each time we have a shipment and say, "How much will you charge me for handling that shipment?"

Mr. JENNEY. Who makes the bill for that?

Mr. Wood. The Transcontinental Freight Company.

Mr. JENNEY. Have you got any of their bills?

Mr. Wood. I have not here. I have in Chicago.

Mr. JENNEY. Would you have any objection to sending us some of their bills?

Mr. Wood. Why, I don't know that I would have any objection to sending you a copy. I could not give you the original bill. That has been filed in the treasurer's office.

Mr. JENNEY. Couldn't you send them here, and file them with the Commission?

Mr. Wood. It is an inflexible rule with our treasurer that all those bills are filed away with the vouchers. I could have copies made and filed.

The CHAIRMAN. For what purpose do you want that, Mr. Jenney?

Mr. JENNEY. If your honor please, I should like to see whether those bills are made up on the basis that he has testified, of
520 the freight rates, plus fifteen per cent for handling.

Mr. SLUSSER. He did not say fifteen per cent. He said fifteen cents a hundred.

Mr. JENNEY. Whatever it may be, for handling, or whether the bill is made up on quite a different basis, such as has been testified to by the Export Shipping Company.

The CHAIRMAN. What is your actual practice with this company? Do you pay the freight rate to them?

Mr. Wood. We pay the whole charge to them, yes; out of which I assume that they pay the railroad companies their charges.

Mr. JENNEY. Does the bill which they render to you show what the actual freight rate of the company is?

Mr. Wood. I could not answer that question without looking at the bills. It may be that they are made, freight rate so much and their charges so much, or it may be made up in one extension. I could not answer that.

The CHAIRMAN. Will you be good enough to have copies made of some of those bills and sent to the Commission. You need not send the originals.

521 Mr. JENNEY. I should like to have the originals, if the Commission please, the original bills submitted by the forwarding agent. I think those are the best evidence.

Mr. Wood. I think I can do that.

Mr. SLUSSER. It seems to me the best evidence is to find out what the contract is between him and the forwarding agent. How they make their extension. How they carry it out is a matter of book-keeping. If you want it for the purpose of impeaching this witness, that is one thing, and you have a way of getting it.

Mr. JENNEY. I want the best evidence. I do not think we ought to be excluded here from getting the best evidence. Of course it is a very simply matter for the witness to come here and say that the arrangement is that they pay the rate plus fifteen cents a hundred. That may be one way of looking at it. The forwarding agent may look at it in a different way. I should like to see how the forwarding agent looks at it.

Mr. SLUSSER. I will give you a chance.

Mr. JENNEY. We want some of the original bills.

Mr. SLUSSER. I will give you a chance.

522 The CHAIRMAN. The Judge says he will give you some of the original bills.

Mr. SLUSSER. I will give him the original forwarding agent who does business with his company. I am not advised as to whether he has any of the bills with him or not, I mean the receipts, but you can ask him about it when I put him on the stand. I don't know about that myself, but Mr. Bunge, the president of the American Forwarding Company, is here, and he says he will send some of those bills for inspection.

Mr. BUNGE. Any number of them.

Mr. JENNEY. I am talking about bills to the Otis Elevator Company that they have paid. If you will have some of those original bills of the forwarding agent, that have been paid by this company, sent to the Commission or care of the Commission, then they can be inspected at the time of the argument.

Mr. SLUSSER. I submit, if your honor please, that a copy sent by Mr. Wood ought to be sufficient. I do not think they ought to be required to mutilate their files.

523 Mr. JENNEY. No mutilation of the files will be necessary.

The CHAIRMAN. It does not seem to me very important, but there is no difficulty, Judge, in your getting some, say, two or three or half a dozen actually bills. You can take a receipt for them

and produce them here at the time of the argument for inspection, and then they can be returned.

Mr. SLUSSER. I will try to do that, and attach them to my brief. I will have to do that with the consent of the concern.

The CHAIRMAN. I assume that they will consent.

Mr. Wood. I assume that they will.

ALFRED H. POST, a witness of lawful age, called by and on behalf of the intervenors, being first duly sworn, testified as follows:

Mr. SLUSSER. What is your business, and where do you operate?

Mr. Post. We are primarily interested as forwarding agents in foreign traffic.

524 Mr. SLUSSER. Where is your business located?

Mr. Post. Our main office is in New York City. We have offices elsewhere in the United States, and four offices in Europe.

Mr. SLUSSER. Will you kindly state the territory within the United States in which you operate?

Mr. Post. We operate over the entire United States.

Mr. SLUSSER. Are you familiar with this so-called "rule" of the Official Classification, under footnote to Rule 5-B?

Mr. Post. I think I am.

Mr. SLUSSER. Kindly state how that affects your business, as related to the export trade.

Mr. Post. As stated before, we are chiefly interested in foreign traffic, both export and import. Some time ago, in connection with the Official Classification territory, we did operate a consolidating carload service from western points via the Atlantic seaboard, on export traffic, exactly as we are doing to-day on trans-Pacific business, which is recognized by the western railroads, and which I was

525 very glad to take advantage of, exactly the same as we are to-day doing on import traffic, through the cognizance of the trunk lines, when they themselves are willing to prorate on the basis of this same physical service, all business originating in interior points in Europe, which they recognize by accepting those rates, and being glad to make their through rates based on the consolidated carload service rendered from an interior point in Europe.

Since the application of Rule 5-b we have not endeavored in any way, shape, or form to operate an export consolidated carload service by the Atlantic seaboard. The last thing we have any desire to do is to take any action which is contrary to law. On the other hand, we do the chief business in consolidated carload service via the Pacific coast for export for the Orient and Australasia, which is permitted under the tariffs existing of the transcontinental and trans-Pacific roads and steamship lines. In my experience I have seen a great deal of export business develop through the United States, which otherwise would not have come to this country, on account of the application of this consolidated carload rate, especially referring

to the trans-Pacific business. It has enabled us, that is to say 526 the merchants, to meet the competition of Europe, and at the same time effect a quicker and a better delivery in the Orient.

for their merchandise, and in competition with English, German, or other European competition. I think it will be a hardship to exporters to have a discontinuance of this rate. I did not come here with any statement of facts regarding the export business via the Atlantic seaboard originating in trunk-line territory, but I could say that I do know of illustrations where shippers are to-day driven out of the export field because they can not afford to pay the less than carload rate from Chicago to New York on export traffic. I also think—I am not in a position to say positively, but I think—that one or two of the trunk lines are to-day countenancing, for one of our competitors, a consolidated carload service. We know this, because we are called to meet the competition of a through rate based from Chicago to Europe, and we can not meet that competition on the basis of the less than carload rate to the seaboard. Therefore we have dropped out of the business. On the other hand, I think we

are in a position to get as low ocean rates as any firm in our
527 line of business in America. We take a very large tonnage, and we are represented directly not only on the New York Produce and Maritime Exchange, but also on the London, Baltic, and Hamburg boards of trade. I have endeavored to cover the various points, speaking with cognizance of the trunk lines, in their being willing to accept the application of a consolidated carload rate in Europe; for example, on hosiery coming from Chemnitz, or on crockery or china coming from Austria or lower Germany. Those through import rates are based on the carload rate from Hamburg or Rotterdam, and the roads charge that through rate, name a through rate into the interior points in this country. Those shipments have been coming forward and generally do come forward in less than carload shipments.

The CHAIRMAN. I do not quite understand. Take the through rate from, let us say, Antwerp to Chicago.

Mr. Post. Yes.

The CHAIRMAN. No; take some point where it would go by rail to the foreign seaport.

Mr. Post. Yes.

The CHAIRMAN. They have over there the difference between carload and less than carload rates?

528 Mr. Post. Yes, they do.

The CHAIRMAN. And the through rate is based on the carload rate over there?

Mr. Post. Yes.

The CHAIRMAN. To the port?

Mr. Post. Yes; to the port.

The CHAIRMAN. It is also based on the carload rate from our ports to the interior destination?

Mr. Post. That is largely governed by special import tariffs which are changing the first of the year, as you know.

The CHAIRMAN. They permit consolidated tariffs all over Europe, do they not?

Mr. Post. They do. We do it ourselves.

The CHAIRMAN. That is recognized in all of the countries where railroads are operated in Europe, including Great Britain?

Mr. Post. Yes.

The CHAIRMAN. This is the only country you know of, this Official territory, that charges L. C. L. rates for consolidated cars?

529 Mr. Post. In my experience, and it is only in trunk-line territory. We operate in western territory.

The CHAIRMAN. Do these railroads represented by these gentlemen here, and who are parties to this record, recognize carload rates for consolidated shipments from the seaboard to points of delivery within their territory?

Mr. Post. I do not know that I understand that question.

The CHAIRMAN. I mean to say, a carload of merchandise imported from Europe and shipped by one of the railroads, party to this record, where there is a diversity of ownership under one bill of lading do they charge on that carload rates or less than carload rates?

Mr. Post. To the best of my knowledge I think the practice has been that the bulk of these shipments have gone forward at the carload rate.

The CHAIRMAN. But if the shipments originate within the trunk-line territory or Official Classification territory, they charge you L. C. L. rates to the seaboard. Is that correct?

530 Mr. Post. Our traffic that comes forward to us at less than carload rates on less than carload, we make no direct attempt to consolidate those shipments, and they are rated by the shippers. They come forward to us at less than carload rates.

Mr. SLUSSER. Would it be an advantage to the shipper, and also to the advantage of the consumer, if carload rates were permitted on consolidated cars within that territory?

Mr. Post. Speaking of the export traffic situation, I conscientiously believe it would be to the interest of the railroad companies to apply the carload rates on that class of business, for various reasons. I believe it would increase the export trade. I believe it would give better service, as has been spoken of earlier. I think it would make quicker deliveries. Our export trade to various quarters of the globe could be built up in competition with the English and Germans, who have been in it for many decades more than we have. Our increase in manufacturing will demand that we seek foreign markets. The best way to build up trade is this: The merchant on his part has got to give satisfaction, and he has got to see that his goods are packed

properly; then he has got to meet the price of competition, and 531 and one of the great factors is going to be service and condition of arrival, and I think that the carload rate on export traffic would be of advantage not only to the merchant, but to the transportation people themselves. I think it has been proven under the carload rate which has been applicable via the Pacific coast gateway on oriental traffic, and it has built up a very large business which never

would have gone that way, but would have been shipped by the Suez Canal in foreign bottoms, and the American railroads would have received no revenue on that business at all.

Mr. SLUSSER. Is there any difference in your experience between the manner in which goods go through at C. L. and L. C. L.?

Mr. POST. I always prefer carload service.

Mr. SLUSSER. Why?

Mr. POST. I think they are delivered better. In all fairness some of the railroads are interested in a system whereby they endeavor to load a car of less than carload traffic, but they promise more than they grant.

Mr. SLUSSER. Do you mean by that that the goods get there in better order?

532 Mr. POST. I think they get there in better order if they are not transferred. Naturally every handling tends to breakage or damage.

Mr. SLUSSER. Do you say that from experience or as a theory?

Mr. POST. I say that from experience.

Mr. SLUSSER. How about the time in which they go through, as to the ability to catch outgoing vessels—if it makes any difference about that in the export business?

Mr. POST. Naturally you are going to make better time on a carload that is routed right straight through without breaking bulk, billed through from Chicago to New York. If it consists of less than carload stuff, it is billed locally to some point in transit and then rebilled from there once or twice. I might cite illustrations, if you want. I think, for example, very often one of the parties here, we will say the Erie road, will take freight from Chicago, and they will bill it to Akron and redistribute it there, and bill it from Akron to Salamanca, and from Salamanca to New York. It is

533 a great deal better to have them billed right straight through from Chicago to New York without breaking bulk.

Mr. SLUSSER. It is important sometimes to catch an outgoing vessel in the export trade.

Mr. POST. As I said before, service is everything.

Mr. SLUSSER. If there is any other point or fact you want to state, you may do so.

Mr. POST. I think not.

Cross-examination.

Mr. WILSON. Are you engaged simply in the export and import traffic?

Mr. POST. Primarily engaged in the export and import traffic, excepting in Chicago we do a western business.

Mr. WILSON. You do not do any domestic consolidation in Official Classification territory?

Mr. POST. As I stated in my direct evidence, we have not done that for some time. We did do it.

Mr. WILSON. When did you do it?

Mr. POST. We did that prior to the application of Rule 5-b, and the business was conducted very satisfactorily. We had practically no claims for damage, and naturally our customers were all satisfied.

534 Mr. WILSON. Well, you said that you could not help feeling that some of your competitors were doing some consolidation now.

Mr. POST. Yes.

Mr. WILSON. You felt the effect of it?

Mr. POST. Yes.

Mr. WILSON. That would be in evasion or breach of Rule 5-b?

Mr. POST. Possibly it would: yes.

Mr. WILSON. In other words, the business of forwarding is against these tariffs—there is a constant temptation, is there not, to get somewhere in between the C. L. and the L. C. L. rate?

Mr. POST. No; I do not think it is a constant temptation, because this business is continually changing, and it will not be on the basis of how much a man can get over the carload rate, but this whole traffic problem in this country is changing. These forwarding fellows are going to be retained, practically as traffic managers to do this class of business. They will receive a regular retainer, 535 but it is not going to be a business of barter.

Mr. WILSON. You mean the traffic managers for the railroads?

Mr. POST. No; for the shippers.

Mr. WILSON. What is going to prevent it from being a matter of barter?

Mr. POST. You might say, what is going to prevent the rush of water at Niagara.

Mr. WILSON. If you will elucidate the relation of that remark to my question I will be very glad.

Mr. POST. Competition and general business conditions bring about results. That is established by precedent, it is true, as you have been trying to bring out, that in bygone days the middleman did profit largely by this consolidated carload service, exactly the same as the railroad companies originally did profit when they only had one class, but it is down to a basis where they will get merely a living service charge in one way or the other for the handling of this traffic. I did not come here to speak of the domestic business, but seeing you ask the question, I give you a direct reply as to my opinion.

536 Mr. WILSON. What is going to bring it down to that basis? What is going to guarantee the absolute integrity of these charges of the forwarding agents?

Mr. POST. Do you want my personal opinion?

Mr. WILSON. I want to know how it is to be done.

Mr. POST. Do you want me to suggest how it is to be done?

Mr. WILSON. Yes.

Mr. POST. I say, put them under the interstate commerce law, make them amenable to it.

Mr. WILSON. But as the interstate commerce law stands to-day, how is it to be done?

Mr. POST. That is a question for them to decide, not for me.

Mr. WILSON. What is to prevent the division of the rate and the barter you talk about as things stand to-day?

Mr. POST. What is to prevent the application of low rates on the part of the Canadian roads into the United States?

Mr. WILSON. Is that your answer to the question?

Mr. POST. Yes.

537 Mr. WILSON. Now, in the case you cite, where your suspicion is aroused against one of your competitors, what do you imagine is the relationship there? Do you think it is a relationship of barter?

Mr. POST. I should like to know. I do not know, and I should like to know very much.

Mr. WILSON. You do not know, do you?

Mr. POST. I do not—I admit that.

Mr. WILSON. It may be anything.

Mr. POST. It may be certainly, but it has to be with the cognizance of the railroad, undoubtedly.

Mr. WILSON. Well, however, that may be, whatever it is, there is no absolute guaranty at the present time that this charge will be on any specific basis? It may represent anything, any barter at all.

Mr. POST. It might; that is possible.

Mr. WILSON. And that is one of the things that troubles you, that this man may be making some arrangement which gives his shippers an absolutely unknown rate?

Mr. POST. It troubles me to this extent, that I believe that the principle he is operating under, in one shape or another, is the correct one, but I said at the beginning of my testimony, as far 538 as our firm is concerned, we do not intend to take any action that is contrary to law.

Mr. WILSON. But there is nothing in the present condition to prevent a man making any barter at all with his shipper, any unknown rate.

Mr. POST. That is his business, not mine.

Mr. WILSON. There is nothing in the present law to prevent it, is there?

Mr. POST. I don't know.

Mr. SLUSSER. I do not understand counsel's question, whether it refers to a bargain between the railroad company and the shipper or a bargain between some intermediate body—it is not clear in my mind.

Mr. WILSON. In order that I may be absolutely specific as far as these defendants are concerned, will you kindly state a little more clearly and plainly what you mean, as to your rates over these defendants' railroads, in response to the question of the judge?

Mr. POST. Which question was that?

Mr. WILSON. I have not understood from your reply what you meant. Did I understand you to say that these defendant railroads were in some way countenancing consolidation in Official Classification territory, meaning by these defendants the D. L. & W., the Nickel Plate, and the Baltimore & Ohio?

539 Mr. Post. I mean the import traffic. No—I say that they recognize the justice of consolidating carload rates in Europe, by their being willing to accept the application of these consolidated carload rates on import traffic.

Mr. SLUSSER. Accept their proportion and share of the carload rate?

Mr. Post. They use that in basing their through rate from an interior point in Europe.

Mr. WILSON. Do I understand you to say that these defendant railroads publish through rates from an interior point in Europe?

Mr. Post. They can make up their rate without publishing it. It is unnecessary to publish the rate from an interior point in Europe.

Mr. WILSON. What you mean to say is this, that the through rate is made up by adding to the rate from the seaport in America the rate in Europe, which is a consolidated rate. Is that the idea?

540 Mr. Post. Exactly.

Mr. WILSON. That being the rate which obtains under the practice in that country, and you mean that that is an implied recognition by these carriers of the justice of consolidation?

Mr. Post. Yes.

Mr. WILSON. I see—that is the only thing you mean with reference to these defendant railroads in this record here.

Mr. Post. I have been talking on the question of foreign traffic, and I have given my views, wherein I thought it would be beneficial for the export trade to be able to operate under the consolidated carload rate.

Mr. WILSON. And the primary object you have, of course, is to develop the import and export trade?

Mr. Post. Primarily, the export.

Mr. WILSON. Primarily, the export trade?

Mr. Post. Yes.

Mr. WILSON. And practically your proposition is to put the export trade on a better rate basis than it is to-day, in order that it may compete in the markets of the world?

541 Mr. Post. I am talking from the export standpoint, and I say this: I do not say of necessity that it needs to be better. I say it is entitled to the carload rate on the physical service rendered by the transportation company.

Mr. WILSON. But your primary object is to get better export rates for this world competition, is it not?

Mr. Post. My object is to see the United States the greatest exporting nation in the world.

Mr. WILSON. That is a laudable object, and I have no more questions.

Mr. JENNEY. I want to ask you one or two questions, Mr. Post. We are interested in this proceeding, in ascertaining what, if any, benefit would be derived from the instrumentality of forwarding agents. As yet I will say to you frankly that I have not seen any benefit which would be derived either to the shipper or the railroad company from the forwarding agent. The only thing I have seen is the question of getting, for less than carload shipments, a carload rate, which would be an advantage to the shipper. Now, as I understand your position with reference to export traffic, the only 542 thing that you are telling the Commission is that it would be beneficial to the country generally and to the railroads and to the shippers in this country if the L. C. L. rate on export traffic were reduced.

Mr. POST. I have said that so far; yes. Do you want me to go further?

Mr. JENNEY. No; just answer my questions and we will get on nicely. Now, the only benefit, from your point of view, in the forwarding agents is that through the forwarding agents you can get this, provided there be no Rule 5-b, you can get this carload rate for the L. C. L. shipment?

Mr. POST. I answer that "No."

Mr. JENNEY. What else is there?

Mr. POST. Because if you did not have forwarding agents you would not have export trade. The railroad companies will not finance shipments, the railroad companies cannot under their law insure a shipment.

Mr. JENNEY. The shipper can, can he not?

Mr. POST. Exactly, but he has got to go and get somebody to do it, and he does not know how. The child has to be taught at 543 school, and the export shipper in this country is in the same position to-day. He is learning.

Mr. JENNEY. There is no objection from any standpoint to a man engaging in business for the purpose of insuring or financing, and things of that kind, which you say you are engaged in.

Mr. POST. Yes; and I will tell you, going further, that the trunk-line railroad companies, through their foreign trade agencies in New York City, are to-day recognizing the consolidated carload service by the distribution to themselves, on through bills of lading, of consolidated carloads of less than carload shipments.

Mr. JENNEY. What do you mean by that?

Mr. POST. I mean that they will take packing-house products delivered by three or four shippers, and they will go to the foreign freight agent, and he makes the distribution to the foreign steamers himself, and they issue five or six or seven bills of lading on it.

Mr. JENNEY. That fact was brought out in the former hearing—the Export Shipping Company.

Mr. SLUSSER. It is in derogation of the rule.

Mr. JENNEY. No; it is not.

Mr. SLUSSER. It is discrimination, then.

Mr. JENNEY. We will concede that it is a practice which of very doubtful propriety; there is no question about that.

Mr. SLUSSER. It would certainly be discrimination under the law.

Mr. JENNEY. I say it is a practice of very doubtful propriety. It is a practice, in my opinion, which will not prevail in trunk-line territory, but that is neither here nor there.

Mr. POST. If it does not prevail, then it is going to throw the small men out of business. The big packer will have all the business and the small man can not ship any.

Mr. JENNEY. If the practice you have been complaining of, which is now afforded to the packers, is done away with?

Mr. POST. Yes.

Mr. JENNEY. It is not going to hurt the small shipper, is it?

Mr. POST. If you discontinue allowing him to put his shipments in one car, four or five packers combining their shipments in one car, the small man will have a full carload, and the only way the small man can compete with the big one is to get that carload rate.

Mr. JENNEY. But that is only permitted to one shipper to-day.

Mr. POST. It is made up by three or four shippers. I came from Chicago just recently, and I was told it was done right there to-day. I am not in that business. I am only giving it to you from hearsay.

Mr. JENNEY. Then we will not spend any time on it. Now, to get to my first proposition, what benefit, so far as your export business is concerned, will be served by the instrumentality of forwarding agents, except in so far as, in the absence of Rule 5, by their method of consolidating the shipments they can give a carload rate to L. C. L. shippers.

Mr. POST. What other benefits, do you mean?

Mr. JENNEY. Yes.

Mr. POST. The benefit will not accrue to the forwarding agent. It will accrue to the merchant.

Mr. JENNEY. I am not asking about the forwarding agent, 546 I am asking what benefit will be derived by this country generally, or by shippers generally, except in that respect.

Mr. POST. I say it will increase the business. I will give an illustration. I do not know the name of it, but there is a concern in Chicago—

Mr. JENNEY. Wait a minute.

Mr. POST. I will answer the point directly by an illustration; I will answer your question.

Mr. JENNEY. Do not talk in generalities. Just give facts.

Mr. SLUSSER. That is what he is doing.

Mr. POST. There is a concern in Chicago which makes blotter baths. Those same blotter baths are made in Germany. The less than carload rate on them is sixty-five cents and the carload rate is thirty cents. They can sell them and export them at thirty cents, but not at sixty-five.

Mr. JENNEY. That is the same old reason. I am asking you whether there is a different reason.

Mr. Post. We have already covered the point that there is a better service and the goods arrive in better condition.

547 Mr. JENNEY. Wait a minute as to that. Then the next two points you give are the better service and that the goods arrive in better condition.

Mr. Post. Yes.

Mr. JENNEY. That is simply due to the fact that goods go through in through cars.

Mr. Post. But the railroad companies do not load through cars with less than carload freight.

Mr. JENNEY. Don't they?

Mr. Post. Some of them do, at times.

Mr. JENNEY. Does not our company have not only through cars from New York to all principal points, including San Francisco, but through trains to Chicago for L. C. L. shipments?

Mr. Post. Then you are just coming around to our point of view. You give the physical service by putting all classes of stuff in your carload, but you charge less than carload rates for it.

Mr. JENNEY. That is exactly the point. The railroads to-day, so far as these defendants are concerned, are giving to L. C. L. shippers just the same through car service that the carload shippers get, are they not?

548 Mr. Post. Unfortunately your road cannot speak for beyond the Niagara frontier.

Mr. JENNEY. We are, in connection with our connecting lines, and the Wabash road are certainly giving the New York shippers similar facilities, and the Baltimore & Ohio, the other defendant, are giving the same through car service as any forwarding agent, are they not?

Mr. Post. I will give you one illustration. I will answer that by illustration. I was talking to one of your own representatives in Cincinnati, and I wanted him to put on a through car from Cincinnati to New York in connection with the Lackawanna road. He said, "Yes, if you will guarantee me fifteen thousand pounds of less than carload stuff to-day, we will do it." I said, "We cannot do that to start with, but maybe only five or six or seven thousand pounds." He said, "We will have to transfer." Now, if there was a carload rate, the shipper could make up that car maybe in two or three days, or other people would take a part of it, and they would make up a car and put it through. Now previous to Rule 5-b going into effect, I

549 think there were two or three carloads a day loaded out of Cincinnati; and even after that rule went into effect the American Express Company still did it, and they loaded several cars at Cincinnati from various machinery shippers, over the New York Central line, and entirely at the carload rate.

Mr. JENNEY. Now, going back to my original question, provided the railroads give the same service that forwarding agents could give

in moving L. C. L. shipments in through cars, so that there is no transfer, is there anything to be gained by the instrumentality of forwarding agents, except that if Rule 5-b is done away with the L. C. L. shipper can get a less rate?

Mr. POST. Pardon me, I have answered your question already. I told you that railroad companies are not forwarding agents, and there are many services required that the railroad companies do not perform and will not perform for a great many years to come. Now, on foreign traffic, you must admit that we are absolutely a new proposition in this country and we have got to learn from our foreign brothers, and perhaps we will go ahead and improve on them, but we must follow along those lines laid down, and the forwarding agent

in Europe is a recognized institution, not only among small shippers, but among the large ones.

Mr. JENNEY. I think I have got as good an answer as I can get. Now, I want to go back to another proposition. You are today engaged in the business of consolidating L. C. L. shipments in western territory not in trunk-line territory, as I understand it. Is that right?

Mr. POST. Yes, sir.

Mr. JENNEY. How do you do that business with shippers?

Mr. POST. Those shipments are consolidated under arrangements that are made either with the shipper or the consignee, and they are put together in a carload and sent out under the carload rate, in accordance with the Western Classification.

Mr. JENNEY. Your own personal place of business is in New York is it?

Mr. POST. Yes, sir.

Mr. JENNEY. Do you solicit business in New York, you and your employees?

Mr. POST. I might say that if you want to get into the consolidation—

551 Mr. JENNEY. Just answer my question.

Mr. POST. I do not.

Mr. JENNEY. Do your agents solicit the business?

Mr. POST. They do, at times.

Mr. JENNEY. When you get a lot of shipments for the West, that is, L. C. L. shipments, do you ship those to Chicago on an L. C. L. rate and then consolidate them there and forward them to the western point?

Mr. POST. We do not need to do that. We can send them at the carload rate.

Mr. JENNEY. Consolidated shipments from New York?

Mr. POST. Yes.

Mr. JENNEY. How?

Mr. POST. By the Morgan line.

Mr. JENNEY. Suppose you want to send them by one of the trunk line roads. Could you send them L. C. L. to Chicago and then consolidate them—is that the way you conduct the business?

Mr. POST. We can consolidate them at a warehouse and send them out as one shipment at the carload rate, because the transcontinental tariff covers the carload rate from the point of shipment in New York.

552 Mr. JENNEY. That is, if you want to send it to the Pacific coast.

Mr. POST. Yes.

Mr. JENNEY. And that is only respecting a limited number of articles which can be consolidated under the transcontinental tariff?

Mr. POST. We always live up to the transcontinental tariff rules.

Mr. JENNEY. But you have only consolidated a few things under the transcontinental rules?

Mr. POST. Oh, no; you can consolidate a great many things.

Mr. JENNEY. Only those things that are permitted in the tariff; no such consolidation as there is in trunk line territory.

Mr. POST. No, that is true, there is not.

Mr. JENNEY. Very limited privileges of consolidation?

Mr. POST. No, not very limited; but there are not the same privileges, but you can consolidate many lines of goods and there are enough of those commodities to move under carload rates at all times.

553 Mr. JENNEY. When your men solicit business from shippers, what do they do—quote them a rate?

Mr. POST. We are getting our business down to the basis of what we term traffic managers.

Mr. JENNEY. What have you done in the past?

Mr. POST. We charge a service charge.

Mr. JENNEY. Do you go to a shipper and quote him a rate?

Mr. POST. We charge him a service charge, above the carload rate.

Mr. JENNEY. That is what you say in your mind. What is the fact?

Mr. POST. We charge a service charge.

Mr. JENNEY. Do you want to say that your solicitors do not go to the shipper and quote him a rate on the shipment of his stuff from the point of origin to the point of destination?

Mr. POST. I think I have answered that question.

The CHAIRMAN. Do you then make him a service charge or do your agents, in point of fact, quote the shipper a rate which covers that charge and the railroad rate?

554 Mr. POST. Why, I don't see that it makes any difference whether that is true.

Mr. JENNEY. That is not the point. What is the fact about it? Do they quote a rate?

Mr. POST. I do not see—do I have to answer that?

The CHAIRMAN. Certainly. You will answer that.

Mr. POST. I think that they quote a rate, and include the carload rate plus the rate for service.

Mr. SLUSSER. Is that a uniform rate for service?

Mr. JENNEY. Judge, will you wait a minute?

The CHAIRMAN. Wait until Mr. Jenney gets through.

Mr. JENNEY. Mr. Post, you can answer the question. You understand exactly what I mean, and what I am talking about. You have been in this business for years. You know what the traffic manager of a railroad does when he goes in to solicit a shipment, and what he has done in the past? He quotes a rate to the man, doesn't he? He quotes a rate to the man and has always done it.

Mr. POST. Yes.

Mr. JENNEY. And is not that just what your solicitor does—quote a rate?

555 Mr. POST. A great deal of our business is handled by contract.

Mr. JENNEY. Then if you handle it under contract, you have quoted a rate before you have made the contract?

Mr. POST. We can quote the carload rate plus the rate for service.

Mr. JENNEY. There is not any reason why you should not be frank with me, is there?

Mr. POST. I am frank in answering the question.

Mr. JENNEY. Now, isn't it a fact that your men habitually, whether it is in New York or Chicago or anywhere else where they go to seek business, quote a rate for that shipment, I don't care how you make it up?

Mr. POST. No; they do not always have to quote a rate. Naturally, in order to get the business, the terms have got to be arrived at; but I do wish to bring out emphatically that any rate that we may quote includes the rate that is paid to the railroad company plus a service charge.

Mr. JENNEY. That is, plus your profit—that is what it amounts to!

Mr. POST. It is not a profit, unless it is a gross profit. It is not a net profit.

556 Mr. JENNEY. It is a gross profit. In other words, if you quote a rate to the shipper, it is something between the L. C. L and the carload rate.

Mr. POST. It has probably got to be.

Mr. JENNEY. It has got to be between the two.

Mr. POST. Absolutely; there is no need of standing on that. It has to be.

Mr. JENNEY. And it depends entirely on circumstances what rate you will quote.

Mr. POST. No; it does not depend on circumstances.

Mr. JENNEY. Suppose that you are competing with some other forwarder in trying to get some shipment, or trying to make a contract with some man. You are going to quote him a less rate, are you not?

Mr. POST. We will not. We have a rate and stick by it.

Mr. JENNEY. And the laws of competition do not control forwarding at all?

Mr. POST. No, sir; I do not think they do.

Mr. JENNEY. You never have?

Mr. POST. So far as we are concerned, we make our rate and we live up to it.

557 Mr. JENNEY. Do you mean to say to the Commission that you never have any different rate to different shippers for the same carriage?

Mr. POST. My dear sir, we could answer that the same as the railroad companies. The railroad companies a while ago quoted many different rates, and so did we, but they are on a firm basis, based on the western carload rates.

Mr. JENNEY. Forwarding agents are to-day?

Mr. POST. I am speaking of Alfred H. Post and Company.

Mr. JENNEY. Do you mean to say that you do not quote different rates to different shippers?

Mr. POST. We do not.

Mr. JENNEY. Have not for the past two years?

Mr. POST. Maybe—I don't know.

Mr. JENNEY. When did you get on this firm basis?

Mr. POST. I could not answer that technically.

Mr. JENNEY. When did you get on this firm basis referred to?

Mr. POST. I think about a year or so ago.

Mr. JENNEY. Since then you have never quoted different rates to different shippers for the same service?

558 Mr. POST. We maintain several offices, and we cannot always control everything happening, but to the best of my knowledge and belief—and I do not know this—that instructions have been issued, and we have endeavored, and I think we have lived up to a firm basis or an agreed rate, which we established sometime ago.

Mr. JENNEY. What is that agreed basis?

Mr. POST. Do I have to answer that?

Mr. SLUSSER. Is that pertinent to this issue, to inquire into the private business of this company, to see what rate they charge? It seems to me that has nothing to do with the question of railroad transportation.

The CHAIRMAN. It would have a good deal to do with it if the proposition you contend for should be upheld.

Mr. SLUSSER. It seems to me that would be a question, then, between the shippers and the persons they employ to do their work, the traffic managers, or whatever you may call them—forwarding agents. They can make their own consolidations, as they do in about ninety per cent of their business.

559 The CHAIRMAN. That brings us back to the old question.

Mr. SLUSSER. Yes; but it seems to me the inquiry here is whether this is a reasonable rule to be enforced by these railroads that are under the interstate commerce act.

The CHAIRMAN. Whether that rule is a reasonable one or not may depend upon what happens under the rule and in consequence of the rule; whether the charges which the shipper pays over the rail-

road rate are reasonable, whether they discriminate as between different shippers, etc.

Mr. SLUSSER. But whether they do that or not would be a question to be taken up later, and the viewpoint would be whether they are customers or not.

The CHAIRMAN. Another thing, if Mr. Post has a uniform rate, which he has endeavored to enforce as he states, and which he instructs his departments to adhere to with shippers, that must be a matter of more or less public knowledge, and there cannot be in that sense any secret that he is required to disclose.

Mr. POST. To the best of my knowledge and belief our basis of quotations to the Pacific coast is \$1.60 from Chicago at incoming railroad stations, and \$1.55 from the terminal of the western railroads.

The CHAIRMAN. That is on first class?

Mr. POST. That is on machinery. That is the only thing we handle.

Mr. SLUSSER. And do you handle the goods at the other end?

Mr. POST. Oh, yes.

Mr. JENNEY. What is the L. C. L. rate on that?

Mr. POST. \$2.60 and \$3.00.

Mr. JENNEY. And your rate is what?

Mr. POST. \$1.60 from the incoming railroad station at Chicago, or \$1.55 from the western railroad station.

Mr. SLUSSER. Does that include the railroad rate?

Mr. POST. The \$1.60 would include the transfer.

Mr. JENNEY. The carload rate is what?

Mr. POST. \$1.40.

Mr. SLUSSER. You charge, then, an advance of twenty cents?

Mr. POST. Fifteen cents.

Mr. JENNEY. So that a shipper of L. C. L. machinery to the West can get the carload rate plus fifteen cents by using the instrumentality of your company?

561 Mr. POST. Exactly.

The CHAIRMAN. The shipper of similar machinery from New York would apparently have to pay the L. C. L. rate up to Chicago plus \$1.60?

Mr. POST. Unless we send it out by the Morgan line. If we send it by rail, we would have to pay the less than carload rate.

The CHAIRMAN. Up to Chicago?

Mr. POST. Yes.

Thereupon, at 12.45 o'clock p. m., the further hearing of this case was continued until two o'clock p. m.

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AFTER RECESS.

The hearing was resumed at 2 o'clock p. m.

Present: Commissioner Knapp (chairman). The counsel for the respective parties were also present.

The CHAIRMAN. Mr. Post, will you kindly resume the stand.

ALFRED H. POST, the witness under examination at the time of the taking of recess, resumed the stand.

The CHAIRMAN. Do counsel desire to interrogate Mr. Post any further? Have you any further questions to ask of Mr. Post?

Mr. SLUSSER. One or two short questions.

The CHAIRMAN. You may ask them now, please.

Mr. SLUSSER. In speaking of the advantage in consolidating cars, counsel for one of the railroads drew out the point that the rate was the important thing. I will ask you whether or not it is of any advantage to have these cars loaded and unloaded by experienced car loaders rather than by railway company employes?

563 Mr. Post. That undoubtedly would be largely in accordance with what the commodity was. There are commodities which require expert loading, while others do not. I presume that some commodities which we are not handling will require special care, where others will not. On the other hand, in a recent conversation with the traffic manager of Beck & Hills, I think the name of the firm is—they are large exporters of furniture—they told me that the chief way they were finding a market was by seeing that their goods were properly packed, loaded, and delivered.

Mr. SLUSSER. By their own experts?

Mr. Post. Yes; they are employing their own men in New York. They are making storage arrangements in New York, where their goods will be all reinspected and will, if necessary, be recoopered, or anything that may be necessary in that direction, before they are exported.

Mr. SLUSSER. Just one question more: Mr. Clarke, I think it was, or possibly Mr. Jenney, referred to the practice in vogue by one of the railroads of giving carload movements to L. C. L. shipments that are received at the railroad terminus and shipped to a common point of destination. State whether or not that practice applies to way shipments.

564 Mr. Post. Why, I think probably Mr. Jenney, in speaking, for example, of the Lackawanna road—they have been one of the principal lines in endeavoring to handle in carloads of that nature, but to the best of my knowledge and belief, I do not think that all less than carload freight is handled in that way by all trunk lines, even though they may endeavor to do so; and in my statement this morning I endeavored to convey the fact that whereas promises were made, they were not carried out, and I do believe that on this export tonnage it would be a mutually advantageous arrangement to both the shipper and the transportation company if it could be handled in consolidated carloads; from the rate standpoint, as regards the railroad, because it would require less equipment, and from the exporter's standpoint, if he could get the carload rate.

Mr. SLUSSER. Are you doing any consolidated carload business to the Pacific coast for trans-Pacific export?

Mr. Post. We are doing quite a large business in that.

565 Mr. SLUSSER. Would it have any effect on your business if the note to Rule 5-b was applied to the western business?

Mr. POST. The best illustration I can give of that is that the trans-Pacific lines had a rate in effect of \$1.75 per hundred pounds on shipments of general merchandise, exclusive of bicycles, automobiles, ginseng, and plated ware, from all points in the United States to ports of call in the Orient, minimum weight 10,000 pounds. When the interstate commerce law became effective, on August 28, 1906, I think it was, that rate was withdrawn, because it was thought, I believe, at that time, that a lower freight rate could not be made to the Orient than was applicable to the Pacific coast. As that matter relates to the consolidated carload service, I can unqualifiedly and truthfully say that it has eliminated the shipments of general merchandise via the Pacific coast to the Orient, and I predict that if the consolidated carload rate on machinery is withdrawn it will decrease it ninety per cent as against Suez competition.

Mr. SLUSSER. At present are shipments made from New York 566 and the Atlantic seaboard to Galveston, to be taken there by the Southern Pacific, that permits consolidated rates?

Mr. POST. They do; and also in export steamers, on oriental traffic, they will give the same rate for any quantity, whether it is a carload or less. This export problem is different in many ways. There are different features to be thought of in connection with it.

Mr. SLUSSER. That is all.

Recross-examination:

Mr. JENNEY. Just one question, Mr. Post. Of course, so far as packing the goods is concerned, L. C. L. shipments, that is the shipper's business in reference to packing. Now, when it comes to loading them in the cars, if the loading is done by the forwarding agent, rather than by the employes of the railroad company, do I understand from your testimony that you think the loading will be done more securely, with less likelihood of loss and damage, if it is done by the forwarding agent than by the employees of the railroad company?

Mr. POST. I believe that such has been the result of the conditions existing in the past, having proven that on consolidated cars of furniture, for example, loaded by forwarding agents—we do not handle any furniture—but that there has been less damage because they employ expert furniture handlers in the loading of those cars.

Mr. JENNEY. That is a matter of hearsay so far as you are concerned?

Mr. POST. I can not say that we have had the direct experience. We do not handle any.

Mr. JENNEY. Of course you appreciate that so far as loss and damage to the freight is concerned, the forwarding agent is not liable to the shipper, whereas the railroad company is?

Mr. POST. I understand that the courts of Massachusetts have decided the other way. In fact, we have just had a case up there which we have lost, and we are liable, and the courts held us responsible, and not the railroads.

The CHAIRMAN. I want to ask Mr. Post one question: I understand your contention to be that different shippers of less than carload traffic to different consignees should be permitted, through the instrumentality of a forwarding agency, or otherwise, to consolidate their shipments into carload lots and get the carload rate?

Mr. POST. Yes.

The CHAIRMAN. Would you limit that to the consolidation of the same kind of articles? For instance, you spoke of handling a good deal of machinery.

Mr. POST. Yes.

The CHAIRMAN. And it would follow from what you said that different shippers of machinery, whose several shipments would be less than carloads, should be permitted to consolidate them, thus getting the carload rates. Now, if the same articles may be consolidated, why not different articles, if they take the same rate?

Mr. POST. Well, that is a question that I will admit frankly it is very hard to answer, and from my limited experience I hardly think that I am the proper person to reply to a question of that kind. It is a very broad question. On the other hand, I do think this, your honor: That as far as possible the classification ought to be made simple. I think that basing it, for example, on the German classification—their classes are very few. They have two less than carload classes, and those same two classes are governed by two carload classes, one for the mixed carloads and the other for the straight carloads. Then they have three more special classes which cover the whole commodities, and I think that the simpler you can get the classification the better; and in so far as that may apply I believe in a general mixing of merchandise.

On the other hand it seems only right and proper that a straight carload of machinery or of iron or steel should be entitled to a lower rate than a mixed carload of various commodities.

On the export proposition, I again believe that if the railroads would only see if, that a mixed carload rate on export merchandise would benefit them, and it would benefit the community.

Mr. SLUSSER. Well, that would seem to imply your belief in the justice of a rate on mixed carloads, somewhere between the carload and the less than carload rate on a particular article.

Mr. POST. I am afraid that I have not the ability to say what should be done in that direction. That is a very deep problem and proposition.

Mr. SLUSSER. To go back to my other question, you suggest that different shipments of machinery moving from different producers ought to be permitted to move together at carload rates?

Mr. Post. I do believe that; yes.

Mr. SLUSSER. And it would seem to follow that different shippers, say, of hardware, should be allowed to combine their shipments?

Mr. Post. Yes.

The CHAIRMAN. And get the carload rate?

Mr. Post. Yes.

The CHAIRMAN. Now, why not combine the machinery and the hardware until you get a carload and get the carload rate?

Mr. Post. Well, we must consider the classification. I do not think there is any carload rate on hardware.

The CHAIRMAN. Take some article that has a carload and a less than carload rate.

Mr. Post. Then naturally it can govern. If you have several fourth-class articles under the Official Classification, they can combine, and they will combine, from one owner, and the railroad will accept it that way.

571 The CHAIRMAN. Let me go a step further. If, then, any and all articles taking, say, fifth class may be combined so as to get the carload rate, and all articles taking the fourth class may combine, then why may not both fourth-class and fifth-class articles be combined and take, say, the fourth-class rate?

Mr. Post. That is already provided for in the classification.

The CHAIRMAN. Oh, no—that is true where you have one owner.

Mr. Post. One owner.

The CHAIRMAN. We will leave that question out. We are talking now about the application of the carload rate to the consolidated shipments of different owners.

Mr. Post. I contend that it should be entitled to that.

The CHAIRMAN. That is to say, if I am interested in shipping starch, and you are interested in shipping soap, and another man is interested in shipping canned goods, no matter though they may take different rates, why should we not be permitted to bring them together until we get a carload and then have a carload rate, say a higher carload rate?

Mr. Post. I believe that is right.

572 The CHAIRMAN. That is exactly where I wanted to bring you, and does not that mean logically one of two things, if not both—the virtual elimination of any difference between carload or less than carload rates, and the application of railroad rates to any quantity?

Mr. Post. That is a question that probably I am not in a position to answer, although I do say that I think the simpler you can make this rate situation the better. If it means that, then I think it is a good thing.

The CHAIRMAN. Would it not inevitably have that tendency?

Mr. Post. It might. On the other hand there will still be less than carload shipments from certain points. Of necessity there must be.

The CHAIRMAN. That is another phase of it.

Mr. Post. Yes.

The CHAIRMAN. Now, to my mind, one phase of this difficulty is here: I can understand that in the city of New York there is such a large number of shippers of a particular article, or kindred articles, that as a matter of constant experience they can be consolidated into

carload lots. They are competing with one another in the various markets which they have to reach. By this process they

are put on an equal footing, so far as the freight rate is concerned, provided the compensation paid to the forwarder, if one is employed, is uniform. But here is another man who is in exactly the same line of business, and competing with them all. He is not located in New York, but he is out a hundred miles. There is nobody in his neighborhood with whom he can consolidate. He is therefore forced to pay the less than carload rate. He is simply put out of business, isn't he, in competition with the other?

Mr. Post. No more than his location makes him so. That would be the same in the case of a carload rate. It would depend on the location. If he showed poor judgment in the location of his factory, that is his fault and not the fault of the tariff or the classification.

The CHAIRMAN. Oh, no; that is a different proposition. If he has not business enough so that he can ship in carloads, that is not the fault of the carrier.

Mr. Post. No; but it might affect exactly the same proposition if he was a full carload shipper, and this applied to-day.

574 The CHAIRMAN. To go a step further, if the application of the rule for which you contend operated to the disadvantage of the single shipper in a small place, would not that in turn act very strongly to concentrate all manufacturing in the large commercial centers, and drive it out of the small towns everywhere?

Mr. Post. That is a broad question. On the other hand—I may be incorrect in the statement—I think that the trend of the times is in the direction of concentrating in manufacture. For example, it is well known that Grand Rapids is a furniture manufacturing place, and a great many of them go there. Why? Because some other concern is there, and in locating, as I understand it in modern business, they go where the competitor is.

The CHAIRMAN. Undoubtedly that is true in certain lines of business, for reasons which appeal to everybody. That seems to be particularly true of furniture, and other illustrations could be given; but there are a very great many articles of large consumption, which are produced in greater or less quantity almost everywhere, where there is no occasion or inducement or advantage in grouping the industries in a particular place. Take, for example, laundry soap. It is made in almost every city and village in the United States. It is used by everybody everywhere. Now, if you have enough soap makers in town so that they can combine their less than carload shipments, they get a carload rate on soap; but the man who is making soap in some little town, who has nobody with whom he can combine, will have to pay the less than carload rate to reach

exactly the same markets, and he will be put out of business, will he not?

Mr. POST. In relation to that, I think that probably laundry soap is always shipped in carloads.

The CHAIRMAN. Oh, no; it is not.

Mr. POST. It may be in less than carloads, but in carloads to some base point, and that brings up again this very case. I was not going to say anything on the domestic proposition, because I admit I am not as well versed as many other people in the domestic end of the business. Mine is foreign traffic, and if this rule was strictly applied, a man, for example, like Kirk in Buffalo, could not ship a carload of his laundry soap to Chicago for thirty or forty consignees.

He must send that at the less than carload rate to the point of destination beyond Chicago; but I think it is right that Mr.

576 Kirk should be able to send that soap as a carload for twenty or thirty cents to Chicago, and there redistribute it.

The CHAIRMAN. Reverse the question: I can understand that as between New York and Chicago, for example, there are so many shippers of the same article at New York, and so many purchasers of that same article in Chicago, that there would be no difficulty in consolidating into carloads; but the consignee at Chicago buys in many instances, and of many articles, to distribute again in the surrounding country, and he does that in competition with some man who does a small distributing trade at Rockford, Illinois, if you please, or Joliet. You could not find shippers enough in New York to get up a carload to Joliet, when you could find plenty to get a carload to Chicago, with the practical result therefore that the traffic moves to Chicago on lower rates than it does to Joliet, and the purchaser at Joliet who wants to sell again, or who must add the cost of his transportation to the price charged the consumer, is at a disadvantage against the purchaser at Chicago. And there again

577 you are proposing a rule which, I ask you to consider, seems to mean a concentration of industries and business in the commercial centers.

Mr. POST. Well, to a certain extent, that must be, your honor. It is only a case of the survival of the fittest. I think that question is an exceedingly broad one, and I do believe in protecting the small man to the extent your honorable Commission wants to do so, that is, if you decide that; but I do say that I believe if the manufacturer can send his consolidated car to the river, that is, to St. Louis or Minneapolis, or St. Paul or Chicago, for redistribution to the points beyond, that he is entitled to the carload rate to those points. I have gone into a discussion of a domestic proposition.

The CHAIRMAN. It is the same question.

Mr. POST. No; not altogether.

The CHAIRMAN. It may not be in its economic aspects, but so far as this law is concerned; because it occurs to me you can not say there may be consolidation of furniture and consolidation of machinery.

and not say that there may be consolidation of groceries and manufactured goods. Where is it to stop?

Mr. Post. If that small man, or the larger one, has to pay
578 the less than carload rate, it stands to reason that the cost all around to the consumer and everyone else is going to be greater. Of necessity it must be, and is there value received for that increased expense? If there is, I have not a word to say.

The CHAIRMAN. I am only asking these questions in my crude way to suggest to you and to these other gentlemen the fundamental question, as it presents itself to my mind. I want to see where this thing is going.

Mr. Post. It is indeed a deep proposition; but I still adhere to my argument, that I believe that a considerable carload service will be a benefit to both the consumer and transportation company.

The CHAIRMAN. Of course, as far as your general position is concerned in respect to exporters, I am very much in sympathy with that, as I have not hesitated to say in private and in public, that I think it is to the advantage of this country to find a profitable market for its surplus abroad, and therefore as an economic question there is very much to be said in favor of low export rates; but take it on your export proposition: Here is some manufactured article which ordinarily does not sell in carload quantities. That is, it is rarely
579 that there is any one buyer wants as much as a carload. Now, in Cleveland, if you please, there are a number of manufacturers of that article in competition with each other. They want to export, and we are all glad to have them. Now, they can combine their different shipments, or sales to different people, and get the carload rate and so export their traffic on a low basis of transportation cost. But there may be twice as many producers of the same article desiring to sell also in the foreign markets, who are scattered all around, one in each town, no one of them able to furnish a carload. Would they not be placed at such a disadvantage that they could not export anything? Might they not be placed at that disadvantage?

Mr. Post. The best way that I can answer that is to consider the conditions that are to-day effective in Germany. Germany is a much smaller state than the United States. They can not accomplish there what we can here. They have not the resources; they have not the individual ability; and they have not the progressive spirit that dominates every American; and if this consolidated carload service is once instituted in this country it will mean an increased
580 interchange of traffic; it will mean increased revenues; I conscientiously believe that. I know it is a radical statement, but I believe what I say.

The CHAIRMAN. That is all.

Mr. SLUSSER. May I ask you this question, Mr. Post: If the rule now enforced by the railroads in the Official Classification territory is to prevail, will not the effect be not to concentrate the commercial business in large commercial centers, but also to eliminate the small dealers in those centers?

Mr. Post. Speaking from the export standpoint, I believe it will.

Mr. SLUSSER. Now, I will ask you if the effect of eliminating that rule would not be this, that the small dealer, living at a country place or at an isolated point, in order to make his shipments, would necessarily assemble his goods at the nearest distributing point from which consolidated shipments could be made, and then to make them in connection with other isolated dealers from that common point?

Mr. Post. You will find that the application of the consolidated carload business on export service will mean a local carload service through a forwarding agent, if you will, at every hamlet, every 581 town of over ten thousand, if there is any manufacturing there at all. That is the condition that you find in Germany to-day. It will mean that you will put manufacturers in the interior in touch with the foreign world, and that they will be seeking a market; that it is going to give room for an increased number of laborers, and it is going to be for the benefit of the country. There is no question about it. I tell you that the transportation companies are standing in their own light.

Mr. SLUSSER. Would not these small producers assemble their stuff at some common point?

Mr. Post. They would, quite naturally.

Mr. SLUSSER. And that would be the manifest result if they were permitted to do so in the Official Classification territory, would it not?

Mr. Post. I certainly think it would, and I wish to qualify a statement that I made that the lack of this concentration will eliminate all the small men. It will not do that. That takes time, but there will be that gradual elimination. Ten years will show an immense difference in the number of exporters in certain lines of goods.

582 Mr. SLUSSER. Take the case that Chairman Knapp gave, of a shipment to Joliet. Would not that be reached through forwarding agents, if you please, by shipment to Chicago for distribution, so that the purchasers would have the carload rates and the carload movement and the safety of handling goods from New York City to Chicago, and then local deliveries could be made from there to the various points? Would not that be the way as far as Joliet is concerned?

Mr. Post. It is an unfair comparison, because it is a large enough city to stand by itself. There undoubtedly would be service.

Mr. SLUSSER. I took that from the chairman's question.

The CHAIRMAN. Take any point.

Mr. Post. I think the tendency would be in that direction.

Mr. SLUSSER. As a matter of fact, Joliet is located so that it would be about as good a place to deliver to as Chicago. I only took that as an illustration. Take some other town. Let us take Elgin, for instance.

Mr. Post. There are thousands of towns you could take. The principle is the same.

583 MR. SLUSSER. But the shipments would be made to a common center, and there shipped in some way L. C. L. to the local point of delivery. Would not that be the result of it?

Mr. Post. That is the principle.

The CHAIRMAN. What the result of transferring the wholesale business of Elgin and of Aurora and those other places, to Chicago?

Mr. Post. No; I do not think it would do that. If it did, it would only be the survival of the fittest, but I do not think so. I think it would make more distributing centers than we have to-day, according to the precedents established in Germany.

The CHAIRMAN. You can pursue the survival of the fittest still further. Why not make a lower rate for the trainload than the carload?

Mr. Post. That is for the Commission to decide. We are arguing on the carloads.

The CHAIRMAN. Let us see. If you may have a lower rate by consolidating less than carload shipments until you get a carload, then why should not the man who furnishes a trainload in buying have a lower rate than the man who simply furnishes a carload?

584 And the moment you do that you turn over the industries of this country to the big men?

Mr. Post. I do not think so, because I do not think you will ever have a condition like that existing.

The CHAIRMAN. I do. If you give a lower rate on a trainload, then only the man who could handle the business in trainloads can do any business. That seems to be perfectly obvious.

Mr. Post. There always has to be a stopping place somewhere.

The CHAIRMAN. Your railroad friends will say, "Stop where we have stopped."

Mr. Post. They want to stop at an unreasonable point.

The CHAIRMAN. That is the whole question.

Mr. JENNEY. Another thought following out the suggestion of the judge, here, on that proposition: At least a large portion of the L. C. L. business moves through forwarding agents?

Mr. Post. I do not believe that. Do you want to know my candid opinion of how it would move?

Mr. JENNEY. He has just said here that the L. C. L. business would be all consolidated.

85 Mr. Post. No; but we are all theorizing more or less. My theory would be that with our American enterprise and the way they look at the future every large center would have its organization such as there is in Rockford. I do not stand here for the forwarding agent. I stand here for the principal.

Mr. JENNEY. Whether it is the forwarding agent or whether it is shippers' association, at any rate the L. C. L. business would all go into the hands of an association or a forwarding agent, would it not?

Mr. Post. Of a community of interests, the same as the railroads have.

Mr. JENNEY. And the forwarding agent, or shippers' association, or what-not, would be in a position to control a large amount of traffic and go to different competing carriers and say, "Here, who is the highest bidder?"

Mr. POST. No; I don't think that.

Mr. JENNEY. And what would have a tendency to bring about just the dangers and rebate conditions that we have been struggling away from in the past, would it not?

Mr. POST. I do not think it would bring that condition at all
586 It has not brought it abroad. Why should it bring it here?

Mr. JENNEY. Why should the import agents or other men such as you know about in New York that have controlled traffic produce such rebate conditions? They have, haven't they?

Mr. POST. They do not do it any more.

Mr. JENNEY. They do not any more, no; because they do not control the business.

Mr. POST. Yes; but what do the railroads say to you to-day?

Mr. JENNEY. That is what I am talking about. Now, if the forwarding agent controls a lot of traffic, is there not great danger of his tendering that traffic to different carriers?

Mr. POST. I will stand on my reply. Under the present conditions of business on the Pacific coast, which is handled in the manner we have handled it, you have not heard any complaint, you have not heard any question of rebating.

The CHAIRMAN. Let me ask you on that point, does the individual shipper have anything to say about the routing of the traffic?

Mr. POST. That can hardly be.

587 The CHAIRMAN. No. No; as Mr. Jenney's question suggests, it is the forwarding agent, the one who does the consolidating, who selects the route.

Mr. POST. Yes; but if the forwarding agent does not distribute his trade among all lines, he gets into trouble.

The CHAIRMAN. How?

Mr. POST. He has to do it. He wants service. There are a thousand and one reasons why it is to his interest to distribute to more than one road.

The CHAIRMAN. Suppose one railroad made it to his interest to send all the traffic by that line, then he would do it, wouldn't he?

Mr. POST. If any man is fool enough, as a forwarding agent, to put himself in the hands of the law by accepting anything better than the tariffs, then I have not anything to say.

The CHAIRMAN. What have you to say about the other question? How are you going to insure that each less than carload shipper gets the same rate? Your forwarding agent is not a carrier. He is not

588 subject to any regulation; you are perfectly free, so far as the law is concerned, Mr. Post, to take the traffic from Chicago at \$1.55 for me, and to charge the judge \$.75.

Mr. POST. May I answer that, Mr. Chairman?

The CHAIRMAN. That is true, isn't it?

Mr. POST. Not exactly, in this way—

The CHAIRMAN. What legal obstacle would you encounter?

Mr. POST. Because, in accordance with our argument, the transportation company receives its carload rate for the physical service performed.

The CHAIRMAN. That has got nothing to do with my question. You pay them the \$1.40.

Mr. POST. Yes.

The CHAIRMAN. Now, you may offer to get the judge's traffic carried for \$1.75 and you may offer me \$1.55, and there is no law in the world to prevent it, is there?

Mr. POST. Well, as far as that is concerned, from my own viewpoint, I am perfectly willing and agreeable to have a basis of charges allowed for consolidation.

The CHAIRMAN. I am asking you if there is now anything in the law to prevent you?

Mr. POST. No, sir; there is not.

589 The CHAIRMAN. Then you would have it in your power to put the judge out of business as against me, as a practical matter?

Mr. POST. Why, certainly.

The CHAIRMAN. And that is a power which you think you should be free to exercise?

Mr. POST. Excepting that competition will never allow that.

The CHAIRMAN. Oh.

Mr. WILSON. We have heard that before.

The CHAIRMAN. Yes; we have heard more or less about that.

Mr. SLUSSER. In that case the shipper who was discriminated against by you as a forwarding agent would have the privilege of combining with his neighbors in some other way, would he not, for the purpose of making his shipments? In other words, he could ignore the forwarding agent?

Mr. POST. Why, certainly; that is his privilege.

Mr. SLUSSER. And combine with others in the same business?

Mr. POST. Yes.

590 The CHAIRMAN. And he could hire a team to cart his goods to the Pacific coast?

Mr. SLUSSER. It might be said that a shipper who had his factory a mile from the railroad would be discriminated against on account of the cost of putting his goods into market as against the man who had his goods on a sidetrack, because he had to pay the cost of cartage. The same thing would be applicable.

The CHAIRMAN. Perhaps the question in this case is whether you are right in what you assume—that this is like a cartage question.

Mr. SLUSSER. I think that, as a legal proposition, has been thoroughly settled by the courts. I want to ask you—

Mr. CLARKE. I am imperatively called away. I want the Chairman to understand my reasons for withdrawal.

The CHAIRMAN. Will you have any further testimony on behalf of the lines you represent?

Mr. CLARKE. I leave that entirely with Mr. Jenney.

Mr. SLUSSER. May I ask Mr. Post this: If the footnote to Rule 5-b is to prevail, would not the effect be that small dealers 591 throughout the West who go to New York City to buy goods commodities that are produced there, would be practically shut out of the eastern market, because they would be unable to buy carload lots and would not be permitted to consolidate with other purchasers? Would it not work, in that way, in favor of eliminating the small dealers?

Mr. POST. As I have previously said, my experience in the Middle West is limited, and I do not wish to make any statements on my own guesswork, and therefore I do not think I am in a position to answer that definitely.

Mr. SLUSSER. Very well.

The CHAIRMAN. You observe, Mr. Post, from my question, that what I have in mind leaves the railroad out of the account, and leaves the forwarding agent out of the account. We may assume that the railroads could afford to lose the revenue which they would lose if this rule were adopted, and there was no change in the carload rate, and assume that the shippers combined and relieve you of your present functions; still we have the question of the effect upon the general public of adopting the plan which the complainant in this case stands for. That is what I am trying to consider; where 592 is this thing going to work out to the thousands and tens of thousands and millions of people who are directly affected by the cost of transportation?

Mr. SLUSSER. Is there any question pending?

The CHAIRMAN. I think not.

Mr. SLUSSER. Mr. Post, do you know what is the basis of the difference in rates between L. C. L. and the C. L., town for town, whether it is based upon the extra increased cost of handling by the railroads and the cost of service, or otherwise?

The CHAIRMAN. We need not go into that. That question is not here in issue.

Mr. SLUSSER. I want to bring out if I can, and I think it is competent, that the railroads on their own contention—because most of these railroads are on record on this proposition, that on many lines of freight they make more, ton for ton, net profit on C. L. shipments than on L. C. L. shipments. I think I can produce the record on that if they deny it.

The CHAIRMAN. That has been repeatedly stated.

593 R. J. Wood, a witness previously sworn, being recalled testified as follows:

The CHAIRMAN. You have already been sworn?

Mr. Wood. Yes.

Mr. SLUSSER. Where do you reside, and what is your business?

Mr. Wood. I reside in Chicago, Illinois, and my business is secretary and manager of the Lincoln Warehouse and Van Company.

Mr. SLUSSER. Have you had experience in the matter of the shipment of freight by railroad throughout the United States?

Mr. Wood. I have in one line.

Mr. SLUSSER. How much experience?

Mr. Wood. Household goods.

Mr. SLUSSER. How much experience have you had in that line?

Mr. Wood. About seventeen years.

Mr. SLUSSER. Do you make shipments for your customers from your warehouse?

Mr. Wood. We do.

594 Mr. SLUSSER. Have you had experience in making L. C. L. shipments into the territory of the Official Classification?

Mr. Wood. Indeed I have.

Mr. SLUSSER. Have you also had experience in making C. L. shipments?

Mr. Wood. I have.

Mr. SLUSSER. Will you kindly state to the Commission the effect upon the business in which you are engaged, and upon the business of your customers and the property interests of your customers, of the enforcement of the note to Rule 5-b in Official Classification territory?

Mr. Wood. Well, we are in the business of packing, shipping, and storing household effects. We do what I may term a high-class business; valuable goods. I presume we ship 75 per cent of our goods to eastern points, New York City being our largest point of shipment; Washington, Philadelphia, and Boston, but the bulk of our shipments are New York shipments. We make a specialty of what we call a "guaranteed" shipment—that is, we take a man's house in Chicago as it stands, pack it up, load it on board the 595 car, ship it to New York City, and move it from the car to his house in New York, unpack it, and set it up under a guaranty. We do that only on one condition, and that is, that it is a carload shipment. Under no circumstances would we accept a less than carload shipment and make a guaranty. The reason is that about 75 per cent of the L. C. L. shipments in household goods are damaged in transit.

We load the car ourselves at Chicago. We notify our correspondents, we will say, in Washington, if the car is consigned there. For instance, not more than two or three weeks ago I shipped a carload of household goods to Washington. I consigned it to the Security Storage Company here. Why did I consign it to them? Because I know the class of work that the Security Storage Company do. I know the class of men that they employ, I know their methods, how they handle goods. Now, I am satisfied to turn that shipment over to the Security Storage Company, and have them handle it, just as much as if I sent my own men down here to unload those goods from the car,

because I know that will do it in the same way, having had several years' experience with them.

596 The result is that, loading it as we do by expert workmen over whom we have direct supervision, and not as the railroad companies have, a large force of men over whom they have no direct supervision, we know that any chance of damage is positively reduced to a minimum, and, as I say, it is very seldom we have any damages in carload shipments—L. C. L. shipments—oftentimes we are forced to charter a car where we have only six or seven thousand pounds of household goods. We do not care to take the chance, with valuable goods, of sending them through the freight house, because usually they are damaged when they arrive at destination. We pay the car-load rate and we save anywhere from \$20 to \$30.

The CHAIRMAN. All that shows the advantages in point of safety to that description of property of carload shipments?

Mr. Wood. Yes.

The CHAIRMAN. But you are asked what effect the enforcement of this note to Rule 5-b has had on your business?

Mr. Wood. What effect would it have?

The CHAIRMAN. What effect has it had? Has it had any effect?

597 Mr. Wood. It prevents us from putting more than one shipment in a car. I might have a shipment to two or three different people and send it to my correspondent in New York in a carload lot, whereas now I am compelled to deliver them through the freight house. I can not ship them in that way consolidated. I have got to deliver them through the freight house. They go through the freight house and are handled by the railroad freight handlers.

Mr. SLUSSER. And oftentimes when they are shipped in that way they are damaged?

Mr. Wood. Yes.

Mr. SLUSSER. Those cars are not guaranteed because of that fact?

Mr. Wood. No; we will never guarantee L. C. L. shipments under any circumstances.

Mr. SLUSSER. You prefer to have the loss fall on your customers?

Mr. Wood. We never guarantee an L. C. L. shipment.

Mr. SLUSSER. To what extent is the business of shipping household goods from Chicago to the Eastern States carried on, in a general way?

598 Mr. Wood. Why, there are a great many shipments made I don't know how many cars we ship out a year. We are not a very large concern. There are larger concerns in Chicago than we are, but we handle a very high class of goods. I presume we ship to the East probably fifty or sixty carloads a year. Of course the amount of L. C. L. shipments that we make is a pretty hard thing to say. I suppose we make two or three or four a week, four or five sometimes every day.

The CHAIRMAN. Formerly you combined those separate L. C. L. shipments?

Mr. Wood. We can not combine them now, we have to ship them to one destination.

Mr. SLUSSER. You formerly did?

The CHAIRMAN. You could?

Mr. Wood. Yes.

The CHAIRMAN. And you were accustomed to do so?

Mr. Wood. Yes; we have done it in a number of instances.

The CHAIRMAN. What I am seeking to know is—

Mr. Wood. We are not doing it now.

The CHAIRMAN. To what extent did you do that before? Of course I assume that you are not doing it now.

599 Mr. Wood. No; we are not doing it now, but oftentimes we have odd shipments going to New York City for three or four or five customers, and if we could load them all into one car and ship them we would.

The CHAIRMAN. What did you do if a man wanted to send household furniture, say, to Yonkers?

Mr. Wood. We could not do it to Yonkers. It would have to be New York City delivered.

Mr. SLUSSER. You send it to New York City on the C. L. and deliver it there?

Mr. Wood. I would send it to my correspondent in New York City, whoever it was, and say: "Here is a carload of household goods to John Jones, a certain number of cases numbered so-and-so and marked so-and-so," and I send my shipping receipt to them and notify them.

The CHAIRMAN. We understand your method.

Mr. Wood. Yes.

The CHAIRMAN. About this question of risk.

Mr. Wood. It was the safety of our customers' goods, insuring safe delivery and quicker delivery by far, by half the time

600 The CHAIRMAN. This question of risk or injury to the property in transit, I can understand, is a very serious one in the matter of household furniture.

Mr. Wood. Very; yes, sir.

The CHAIRMAN. But that would not be true of canned goods or groceries or anything of that kind, would it?

Mr. Wood. No, sir; I do not think so; not so much; not to the extent that it would in household goods; no, sir.

The CHAIRMAN. It would be of no consequence, would it?

Mr. Wood. No; I doubt if it would be.

The CHAIRMAN. Do you think this rule should be restricted to kinds of property which can not safely be carried unless they have carload lots, or should the door be wide open to all kinds of shipments, whether they involve any risk or not?

Mr. Wood. It certainly goes quicker, gives quicker delivery, it gives safety in transit, and I do not see why they would not be combined.

The CHAIRMAN. It would have the effect of greatly reducing the amount of less than carload shipments, would it not?

601 Mr. Wood. It probably would reduce them somewhat.

The CHAIRMAN. That would also have the effect of reducing the income of the railroads, would it not?

Mr. Wood. It would largely increase the carload shipments; I presume it would, perhaps.

Mr. SLUSSER. Would it decrease the net income of the railroads, in your opinion?

Mr. Wood. Of course, I speak more particularly from my own standpoint, because I am not conversant with the general merchandise shipments, but I do know this, that where we load a car of household goods we load it ourselves. The railroad is put to no expense at all. It cuts down the expense to the railroads.

The CHAIRMAN. You need not spend any time on that. We understand that carload shipments are loaded by the consignor and unloaded by the consignee.

Mr. SLUSSER. The equipment is not so long in service?

Mr. Wood. No, sir.

Mr. SLUSSER. And they can haul more in a car?

Mr. Wood. Yes.

602 Mr. SLUSSER. May I ask you whether you have had occasion in your business to use the instrumentality of a forwarding agent?

Mr. Wood. Many times.

Mr. SLUSSER. Name the kind of shipments, and where.

Mr. Wood. In making household goods shipments to the Pacific coast, to Seattle, Washington.

Mr. SLUSSER. How has that operated, in a practical way?

Mr. Wood. Very much to our advantage and very much to our customers' advantage. As I said before, they get their goods more safely and much more quickly. We have never had a complaint of damage where we have forwarded the shipment by a forwarding company, no claim for damage at all.

Mr. SLUSSER. Do you know how they unload their goods and how they load them?

Mr. Wood. Yes.

Mr. SLUSSER. How?

Mr. Wood. Assemble them at the freight house and load them to go in one car.

Mr. SLUSSER. Do you know how quickly they load a car as compared with the loading of a car by the owner, a straight car?

603 Mr. JENNEY. I suggest that you get those facts from somebody who knows more about them.

Mr. Wood. That I will leave to them.

The CHAIRMAN. Anything further, Mr. Slusser?

Mr. SLUSSER. That is all.

Cross-examination:

Mr. JENNEY. I want to ask you how you have made your rates with the forwarding agents. Have you gone to them or have they come to you?

Mr. WOOD. The forwarding companies in Chicago have rate cards printed out, all the same.

Mr. JENNEY. Since when have they had rate cards?

Mr. WOOD. We have had rate cards from them for a long time, stating that the rate to Los Angeles was so much, and the rate to San Francisco was so much, and the rate to Seattle was so much.

Mr. JENNEY. What forwarding agents have you shipped with?

Mr. WOOD. The Transcontinental Freight Company, Bekins Household Shipment Company, and some few shipments through the American Forwarding Company.

604 Mr. JENNEY. When you have had a shipment have you gone to them or have they come to you?

Mr. WOOD. I have called them up and asked them if they had goods going to such and such a point—"Have you got something going to such and such a point? If you have, I will deliver some goods to you."

Mr. JENNEY. Any discussion between you at any time during past years about terms?

Mr. WOOD. Never has been.

Mr. JENNEY. Never has been?

Mr. WOOD. No, sir.

Mr. JENNEY. Never have had any discussion of any terms at all?

Mr. WOOD. No, sir; never any discussion of terms.

Mr. JENNEY. Have you or your customer been the one that has paid the freight?

Mr. WOOD. Have we?

Mr. JENNEY. Yes; I say, you or your customer?

Mr. WOOD. Often we prepay the freight charges ourselves and oftentimes they are paid at destination.

605 Mr. JENNEY. What rates have you paid the forwarding agent, as compared with the L. C. L. rate or the carload rates on furniture?

Mr. WOOD. They have been less.

Mr. JENNEY. Less than what? What rates have you paid the forwarding agent as compared with L. C. L. or carload rates on furniture?

Mr. WOOD. Between the L. C. L. and C. L. rates, of course.

Mr. JENNEY. Are you familiar with what the rates are?

Mr. WOOD. I am.

Mr. JENNEY. What is the wholesale rate, for instance, on furniture—

Mr. WOOD. Household goods you mean?

Mr. JENNEY. Yes; to a place like Denver.

Mr. WOOD. Do you mean released or carrier's risk?

Mr. JENNEY. The ordinary L. C. L. rate.

Mr. Wood. Carrier's risk or release?

Mr. JENNEY. At carrier's risk.

Mr. Wood. Carrier's risk is once and a half times first class on L. C. L. shipments. It is carload rate on C. L. shipments, released usually. We ship to the coast. Take, for instance, the rate from Chicago—

606 Mr. JENNEY. What is it a hundred pounds, L. C. L.?

Mr. Wood. L. C. L., something like \$3 to Los Angeles.

Mr. JENNEY. And the carload rate?

Mr. Wood. \$1.12½

Mr. JENNEY. What rate do you get?

Mr. Wood. \$1.75.

Mr. JENNEY. Take Denver; what is the L. C. L. rate on the way you ship?

Mr. Wood. To Denver, I do not recall what the L. C. L. rate is; something over \$2.

Mr. JENNEY. Give me any other point where you know the rate.

Mr. Wood. To Seattle we have had the same rate, \$1.75, and Santa Barbara—

Mr. JENNEY. From the forwarding agents?

Mr. Wood. Yes.

Mr. JENNEY. \$1.75 to Santa Barbara. What rates have you had from forwarding agents to any other point?

Mr. Wood. About the only points we have shipped to through forwarding agents have been Seattle, San Francisco, Los Angeles, and Santa Barbara.

Mr. JENNEY. You never have used them to intermediate points?

607 Mr. Wood. I have used them to Denver, but I do not recall the rate.

The CHAIRMAN. Are the carload rates from Chicago to all these points on this description of property \$1.12½?

Mr. Wood. No; that is the carload rate to California points, not to Dnever. We pay \$1.12½, with a 20,000-pound minimum. That makes a car from Chicago to Los Angeles or San Francisco cost \$225.

The CHAIRMAN. Is it the same to Seattle?

Mr. Wood. I think it is about the same to Seattle. I am not so familiar with Seattle, because we make fewer shipments there than we do to the other points.

Mr. JENNEY. Do you always pay the same amount above the carload rate?

Mr. Wood. We have always paid about the same amount above the carload rate.

Mr. JENNEY. That is, about 62½ cents apparently?

Mr. Wood. Something like that.

Mr. JENNEY. Do you understand my question and do you say that you never have used forwarding agents during all of the seventeen years, so far as you can now recollect, except for shipments to Seattle and points west?

608 Mr. WOOD. We have never used forwarding agents on Official Classification business; that is, eastbound business.

Mr. JENNEY. Never have used them at all?

Mr. WOOD. Never have used them at all; no forwarding agents at all.

Mr. JENNEY. So that the only objection that you have to Rule 5-b is in so far as it has prevented you where you have happened to have several shipments moving to a particular destination at the same time, and that does not happen three times a year, does it?

Mr. WOOD. No; but it would benefit us very largely if we could ship all our eastern stuff in consolidated cars rather than turn them over to the L. C. L. shipments—ship them L. C. L. It would reduce the damage to a minimum.

Mr. JENNEY. You mean you could use forwarding agents on eastbound?

Mr. WOOD. Yes.

Mr. JENNEY. You would get less rates?

609 Mr. WOOD. I do not think it would make much difference.

The difference between carload and L. C. L. is only ten cents on New York shipments, 65 and 75 cents, and a 12,000-pound minimum.

Mr. SLUSSER. What would the advantage be?

Mr. WOOD. The advantage would not be in the price; it would be in the safety and quickness of delivery. That is the main point in our business.

Mr. JENNEY. That is all.

Mr. WILSON. You could make these arrangements you speak of for consolidating household goods because you are located at Chicago, could you not?

Mr. WOOD. Well, yes.

Mr. WILSON. Well, now, where would the man come in who is located at Akron, Ohio? Say he wants to move his family and household goods down to New York?

Mr. WOOD. He would not be able to come in unless he had a number of shippers and warehoused his goods until such time as he had sufficient quantity to make a carload.

Mr. WILSON. The chances are he would ship his household goods at the L. C. L. rate, especially if he had to move—at the L. C. L. rate?

Mr. WOOD. Yes.

610 L. D. ROSENHEIMER, a witness of lawful age, called by and on behalf of the intervenors, being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside and what is your business?

Mr. ROSENHEIMER. Chicago; traffic manager of the Liquid Carbonic Company and its five subsidiary companies.

Mr. SLUSSER. Will you kindly state to the Commission what experience you have had in your lifetime in a general way in handling freight by railroad?

Mr. ROSENHEIMER. My past experience?

Mr. SLUSSER. Yes; in a brief way. In what way has your business brought you in relation to the freight traffic business?

Mr. ROSENHEIMER. Well, that is a rather lengthy detail. However, in a general way, and in concise form, I spent approximately ten years and a little over with the Chicago, Milwaukee and St. Paul Railway; half of the time in their train service, the other half in the traffic department; two or three years of the latter half of that 611 time in the local freight office, practically working over every desk in that office in the Union Street Station, the largest one in Chicago; that is the largest station of the St. Paul Company.

In 1901 I identified myself with the McCormick Harvester Machine Company.

Mr. SLUSSER. As traffic manager?

Mr. ROSENHEIMER. No, sir; as clerk. I left the local office of the St. Paul to go over there. Ninety days later I was appointed agent of the Illinois Northern, a property closely allied to the McCormick Harvester Machine Company.

At the time of the amalgamation of the International Harvester Company, or about ten months after the amalgamation, approximately, I was made car-service director.

In 1904, in September, I accepted the position of traffic manager for the Liquid Carbonic Company, the company I am still with.

Mr. SLUSSER. Are you able to state approximately the tonnage of freight that is shipped by your company, both inbound and outbound?

612 Mr. ROSENHEIMER. Approximately 15,000 tons per month on the aggregate. That would be conservative.

Mr. SLUSSER. Is that all under your supervision?

Mr. ROSENHEIMER. Yes.

Mr. SLUSSER. In your business have you found it necessary to make L. C. L. shipments?

Mr. ROSENHEIMER. Very much so. Practically 90 per cent of our business is L. C. L.

Mr. SLUSSER. Have you followed the principle to any extent of consolidating your shipments with like goods of other owners?

Mr. ROSENHEIMER. Yes, we have; particularly on export and consignments to points on both coasts—that is, on consignments of machinery, and also those consignments we forward through the instrumentality of the forwarding agencies. Then we consolidate car-loads of L. C. L. consignments ourselves for distribution at various points. Those cars were made up at one of our subsidiary plants, the Diamont Soda Works, in Milwaukee.

Mr. SLUSSER. State to the chairman what the character of the goods is for the most part that you ship.

613 Mr. ROSENHEIMER. Well, that are diversified. We are interested in and ship practically seventy-five different commodities. We are manufacturers of soda fountains and fixtures, liquid carbonic acids, bottling machinery, bottle filling machines, carbonating machinery. We take the output of four bottling

plants in the country as a jobber, handling their entire output. We take the entire output of one plant of what we are known in the Official Classification as bottle carriers; also extensive manufacturers of crushed fruit, or what are known as preserves. We are probably, if you will pardon the statement, the largest manufacturers of flavoring and fruit syrups in the country. Those are the most important products.

Mr. SLUSSEN. Now, do you find it to your advantage to consolidate your shipments to the West; and if so, in what way, and how do you accomplish it?

Mr. ROSENHEIMER. Well, we find it necessary on carbonating machines and bottle-filling machines for export, and on carbonating machines to coast points.

Mr. SLUSSEN. Why?

Mr. ROSENHEIMER. The local competition and water rates are the principal obstacles we are obliged to face. The local manufacturer in San Francisco certainly has the advantage of cost of transportation as against us. If it were not for the forwarding company, no doubt our sales would be materially reduced at these points; that is, not only at the coast points, but points back from the coast. We can oftentimes afford to pay the L. C. L. rate back. It would be better to say that the difference between the L. C. L. rate and the carload rate oftentimes resolves itself into the profit on a machine.

Mr. SLUSSEN. Do you mean to say that if you could not get the benefit of the C. L. rate on some of your goods which you sell on the Pacific coast, and if you could not combine with other owners through the forwarding agents you would lose the sale, and the railroad companies would lose the tonnage; is that it?

Mr. ROSENHEIMER. If we lost the sale, they certainly would not get the tonnage.

Mr. SLUSSEN. To what extent would you be affected in that way?

Mr. ROSENHEIMER. Well, that is a pretty hard thing to say.

Mr. SLUSSEN. A matter of opinion?

Mr. ROSENHEIMER. Many times men are willing to pay more for our machine than they would for some machine manufactured by a local factory.

The CHAIRMAN. Are all the goods that you combine on about the same class of goods?

Mr. ROSENHEIMER. That we combine; yes.

The CHAIRMAN. Taking generally what rate to the Pacific coast?

Mr. ROSENHEIMER. Well, the carbonating machinery, we get the benefit of the carload rate. Under the western classification we have carbonators set up and crated first class. That is the Pacific Coast Classification on those machines; but that rate is \$3 as against the carload rate of \$1.40. For services rendered through the instrumentality of a forwarding company we pay an additional 15 cents, and then we find it of exceeding great advantage in moving these consignments through that channel on account of the condition in

which they arrive. There is very seldom any breakage anywhere from one to a half a dozen boxes of parts.

The CHAIRMAN. We do not need to go into those details, Mr. 616 Rosenheimer; but what you have been saying suggests this, and you will pardon the interruption. All this may be greatly to your interest, but how about this local manufacturer in San Francisco? What has he got to say about your proposition? Now, you say on many of these articles it is a question of the freight rate; that is, the cost of moving the products from the place of manufacture to the consumer. Now, here is a man who makes a soda fountain in San Francisco, in competition with you, who ships it, say, to Reno. He will have to pay a less than carload rate?

Mr. ROSENHEIMER. Well—

Mr. SLUSSER. Now, you want, by combining with somebody else, to be able to ship 1,500 miles for what it costs him to ship 300 miles. That is what it really comes to, isn't it?

Mr. ROSENHEIMER. Certainly, if we are prevented, or in other words, do not have this opportunity, I believe it would result in the establishment of provincial lines. We would have our limited territory, and so would they.

Mr. SLUSSER. This enables you to compete in his market; is that it?

Mr. ROSENHEIMER. That is the idea.

617 Mr. SLUSSER. You also have to pay the L. C. L. rate out of San Francisco to the local point, as he does?

Mr. ROSENHEIMER. Certainly. That necessarily follows.

Mr. SLUSSER. If it is to a local point, away from the distributing center?

Mr. ROSENHEIMER. He would have to pay it or the consignee.

Mr. SLUSSER. Somebody would have to pay that rate? It would add to the rate to the cost of the machines?

Mr. ROSENHEIMER. Exactly.

Mr. SLUSSER. How do you ship your goods into the eastern territory now, the Official Classification territory?

Mr. ROSENHEIMER. The only thing that we are interested in particularly, in shipping through this agency, I should have stated before, is machinery, and, so far as we are concerned, making up cars individually, the product of the Diamond Soda Works.

Mr. SLUSSER. That is to say, you have a carload of your own traffic?

Mr. ROSENHEIMER. Yes.

618 Mr. SLUSSER. Don't you have to make L. C. L. shipments into eastern territory?

Mr. ROSENHEIMER. Yes; export. Under existing conditions I believe it is that cause more than any other which deprives us of going into foreign territory as against the New York and Boston shippers. These machines are sold in large quantities. There is no carload business on carbonating or bottle-filling machinery, and there is quite a difference in the rate between Chicago and the seaports. There is a difference of 30 cents as against 70 cents a hundred. These

machines weigh anywhere from three to six tons, and it just adds at much more to the cost of the machine, or the reduction of our profit.

Mr. SLUSSER. Do you find that you are unable to meet certain competition?

Mr. ROSENHEIMER. Certainly; we are unable to meet competition in the seaports. That may not always be true, if a man may consider the advantage of taking our machines against some one of our competitors, but in the aggregate it is true. I don't think there is any question about it.

Mr. SLUSSER. How do you ship carbonic acid?

Mr. ROSENHEIMER. Practically all in L. C. L. lots. That is in the C. F. A. and the trunk-line territory we have been deprived of shipping otherwise, so to speak.

Mr. SLUSSER. Does that militate against you?

Mr. ROSENHEIMER. Well, it certainly would, in a measure.

Mr. SLUSSER. How do you ship out into western territory?

Mr. ROSENHEIMER. Well, we are not consolidating so much West, from the fact that we are establishing plants throughout the West, and other manufacturers of the same products have distributing depots throughout the West, and they ship to those points and make distribution from there.

Mr. SLUSSER. You have had some experience in shipping machinery, have you not?

Mr. ROSENHEIMER. Well, in a measure, yes.

Mr. SLUSSER. State to the Commission whether it is an advantage to the manufacturer of machinery to consolidate shipments with other owners; whether that practice is to his advantage, and is carried on to any extent?

Mr. ROSENHEIMER. If you will pardon me, please repeat that.

Mr. SLUSSER. My question is, whether the manufacturer of machinery, for instance, in the lines in which you were formerly employed, finds it to his advantage to consolidate with other owners, through forwarding agents or otherwise, for the shipment of machinery?

Mr. ROSENHEIMER. Well, we find it to advantage to consolidate on that particular traffic I speak of.

Mr. SLUSSER. On machinery?

Mr. ROSENHEIMER. On machinery, particularly. We do not consolidate on any of our other products, but I have always felt, and do yet, that I can not see why we should be permitted to mix commodities of a class and not be permitted to mix consignments from various consignees of the same commodity. That has been a point I never could comprehend, from the standpoint of a carrier or shipper. The former benefits a few and the latter benefits the masses.

Mr. SLUSSER. Is there any difference in the time in which a carload shipment will go through, as against an L. C. L. shipment?

Mr. ROSENHEIMER. Very material.

Mr. SLUSSER. What is the difference in time?

621 Mr. ROSENHEIMER. That is pretty hard to say. I never knew two shipments to make the same time in my experience.

The CHAIRMAN. It is enough for our purposes that the difference is in favor of the carload shipments.

Mr. SLUSSER. Is there any difference in point of order or condition in which the goods go through?

Mr. ROSENHEIMER. Naturally, carload consignments always go through under better conditions, because they are not handled as often as L. C. L. consignments.

Mr. SLUSSER. You consider the L. C. L. shipment as bad economy do you not—it is a waste of the product?

Mr. ROSENHEIMER. Not exactly a waste. It is quite a little additional expense, the handling and subsequent claims, etc., on the L. C. L. proposition, as compared against carload business.

Mr. SLUSSER. I mean it is not economy; taking all interests concerned, it is a wasteful way of making shipments as against the C. L. shipments?

Mr. ROSENHEIMER. That depends on the destination. I believe so to a great extent.

Mr. SLUSSER. Speaking now from your experience as 622 railroad man, what justifies or makes up the difference between the L. C. L. and the C. L. rate?

The CHAIRMAN. I do not think we need to go into that. There is a difference, and the extent of that difference appears.

Mr. SLUSSER. I wanted to see whether that would measure the difference between the two rates.

The CHAIRMAN. Nobody could tell whether it does or does not.

Mr. SLUSSER. Others have given the cost, and I wanted to see whether he knows it or not.

The CHAIRMAN. I shall venture to assume that he can not add very much to our knowledge on that subject.

Mr. SLUSSER. What has been your experience with forwarding agents—satisfactory or otherwise, as to the manner in which they load the goods and forward them in your behalf?

Mr. ROSENHEIMER. Very satisfactory.

Mr. SLUSSER. What forwarding agent have you used?

Mr. ROSENHEIMER. The Alfred H. Post Company, the Transcontinental Freight Company, and the American Forwarding Company principally.

623 Mr. SLUSSER. Is there any other fact you wish to bring out?

Mr. ROSENHEIMER. Why, yes; in conjunction with liquid citric acid, that I spoke of a moment ago, we are prohibited entirely from consolidating less than carload lots to various consignees. We are not doing that and have not been for a long, long time. In fact we never did it to a very great extent; but there have been times when we wanted to do it. But I do want to say this, in explanation. We never assume the freight on that product. It is always assumed by the consignee. Consequently in many localities it is a question of competition altogether. They buy from some plant closer at hand, unless

they can get the benefit of the carload rate, through some agency similar to a forwarding agent, or through ourselves in consolidating. There is probably not an instance on record where the manufacturer of liquid carbonic acid assumes the freight charges. That is a question that we are not interested in at all.

The CHAIRMAN. Mr. Rosenheimer, ordinarily in the lines of goods which your concern handles, the man who got the carload rate 624 would hold the trade, as against the man who had to pay a less than carload rate, would he not, and the difference would ordinarily approximate the profit of the business, would it not?

Mr. ROSENHEIMER. Well, it does, as I said a moment ago, on carbonating machinery to the locality referred to. It might also hold good if we could load in mixed carloads or through the consolidation process to other points. Thus far in our experience that has been somewhat limited, and I do not know whether they consolidate cars to any other points outside of the coast points.

Mr. SLUSSER. You are not permitted to try the experiment east, are you, as it stands?

Mr. ROSENHEIMER. No; and we have made a good many changes on account of that rule, too. We have increased the capacity of our plants at New York and Pittsburgh and Cincinnati, and there is good prospect of establishing one at Baltimore.

The CHAIRMAN. That is, you have distributed your activities, instead of concentrating them?

Mr. ROSENHEIMER. Well, commerce in a measure has brought it about, and the conditions, and I believe Rule 5 has been responsible, as much as anything else, because if there was a shortage, we could consolidate various consignees. If there was a shortage so far as the capacity of a certain plant was concerned, say at New York, Pittsburgh, or Cincinnati, we could load at other points, St. Louis, Kansas City, or Chicago. We are unable to do that under existing conditions in the C. F. A. and the trunk-line territory.

Cross-examination:

Mr. JENNEY. Your business is located in Chicago, isn't it?

Mr. ROSENHEIMER. Yes; that is one of our plants.

Mr. JENNEY. And as I understand you, you do not complain about the carload rates you get when you ship in carloads, do you?

Mr. ROSENHEIMER. No.

Mr. JENNEY. What you want is to get a carload rate when you ship less than a carload, in order that you may compete with the fellow whose plant is located at San Francisco, and in order that you can compete with the fellow whose plant is located in New York and Boston?

626 - Mr. ROSENHEIMER. To be frank, yes; that is exactly what I said.

Mr. JENNEY. And you think the railroad company ought to give you a rate which will enable you to do that, or a practice or regulation?

Mr. ROSENHEIMER. Will you repeat that?

Mr. JENNEY. You think that the railroad companies by practice or rates or regulations, or what not, ought to give you rates that will enable you to do that?

Mr. ROSENHEIMER. I think that they should do that on all of our products. I think that is the idea.

Mr. JENNEY. I want to ask you another question. What do you say you pay these forwarding agents? What rate do you pay them for shipments of machinery to the Pacific coast? What is the flat rate you pay them?

Mr. ROSENHEIMER. We pay them for—

Mr. JENNEY. Isn't it \$1.65?

Mr. ROSENHEIMER. No; we pay them for service—

Mr. JENNEY. Never mind their service. What do you pay them?

Mr. SLUSSER. Let him answer the question. That would be the better way.

627 Mr. ROSENHEIMER. Those people do not quote me any rates

Mr. JENNEY. What do you pay them for a shipment of machinery to the Pacific coast?

Mr. ROSENHEIMER. \$1.55.

Mr. JENNEY. Haven't you paid them \$1.65?

Mr. ROSENHEIMER. No, sir.

Mr. JENNEY. Do you swear that you never paid any forwarding agent \$1.65 on machinery shipments to the Pacific coast?

Mr. ROSENHEIMER. That is going back a good ways.

Mr. JENNEY. In the last two years?

Mr. ROSENHEIMER. No, sir; I do not believe we have, to the best of my knowledge and belief.

Mr. JENNEY. You do not want to testify positively?

Mr. ROSENHEIMER. No; I would not dare to do that, because my records are of considerable magnitude, and I do not handle the business individually. I have clerks who do most of the work for me.

Mr. JENNEY. That is all.

Mr. WILSON. No cross-examination.

The CHAIRMAN. You are excused.

628 ROBERT SOMERVILLE, a witness of lawful age, called by and on behalf of the intervenors, after being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside?

Mr. SOMERVILLE. In Chicago.

Mr. SLUSSER. What is your business?

Mr. SOMERVILLE. I am the president of the Judson Freight Forwarding Company.

Mr. SLUSSER. How long have you been engaged in that business?

Mr. SOMERVILLE. Since 1903.

Mr. SLUSSER. In what business were you before that time?

Mr. SOMERVILLE. I was employed for the period of thirty-two years continuously by the Chicago & Alton Railroad.

Mr. SLUSSER. Are you familiar with the freight-handling business of the railroad companies?

Mr. SOMERVILLE. Fairly so.

Mr. SLUSSER. You understand what is meant by C. L. and 29 L. C. L. shipments, from the standpoint of a railroad man as well as from that of a shipper?

Mr. SOMERVILLE. Quite as well.

Mr. SLUSSER. Will you state to the Commission the particular line in which your company is now engaged?

Mr. SOMERVILLE. Almost exclusively in the handling of household goods.

Mr. SLUSSER. Will you tell the Commission somewhat definitely how it operates and how you handle it through your company; where our shipments come from and where they originate?

Mr. SOMERVILLE. We solicit shipments of household goods in all the territory east of Chicago and St. Louis to the Atlantic seaboard, and consolidate them at Chicago and in St. Louis, and we reship them as carload lots to certain distributing points, Los Angeles, San Francisco, Portland, Tacoma, Seattle, Spokane, &c., and when we get together a sufficient amount of goods to make up a carload or any one point, we order the car, loaded on the day it is placed, loaded by our own expert men, consign it and deliver it to the railroad company, and it goes out the same day. We receive it from the railroad company at the point of destination, where we 30 handle it by our own men and distribute the contents.

Mr. SLUSSER. What has been your experience as to the order in which the goods go through when shipped in that way?

Mr. JENNEY. We are not going to offer any proof on that branch of the case.

The CHAIRMAN. No; it is only cumulative and not necessary.

Mr. SLUSSER. If it may be considered cumulative, I will not put at question any more. And also on the point of the time in which it will go through, I suppose you will offer no evidence on that.

Mr. JENNEY. We will not.

Mr. SLUSSER. What is the volume of goods that you handle?

Mr. SOMERVILLE. I might say about an average of a car a day for three hundred and sixty-five days of the year.

Mr. SLUSSER. Do you make any specialty of household goods?

Mr. SOMERVILLE. We make a specialty of household goods.

1 Mr. SLUSSER. How do you get the goods to your forwarding station for consolidation—in what way?

Mr. SOMERVILLE. They come to us as L. G. L. shipments from the territory in which they originate.

Mr. SLUSSER. By railroad?

Mr. SOMERVILLE. Altogether by railroad, except, of course, where they originate at Chicago, they are delivered by team to our warehouse.

The CHAIRMAN. Pardon me, Judge, but he seems to me to be engaged in a line of business that is not affected by this note to Rule 5-b.

Mr. SLUSSER. Except that it will be very much affected if the interpretation is put upon the second section of the act which is claimed by the railroads here, because this involves, it seems to me, the interpretation of the second section of the act, and that interpretation may compel the western lines to make a different classification.

The CHAIRMAN. Let us see how he has been affected, if at all, by the note to Rule 5-b.

Mr. SOMERVILLE. Since I have been in the business of forwarding household goods, during all that time I think I am correct in saying that the rule has been in effect, and therefore it has acted as a stop from my doing business to the territory in the East.

The CHAIRMAN. If it were not for that rule, what would you do?

Mr. JENNEY. Which you do not do now.

Mr. SOMERVILLE. One never can tell what they might do if the opportunity was open; but, as a matter of fact, I have never shipped any cars East because of the existence of that rule.

Mr. SLUSSER. But you have no partiality against shipping toward the West?

Mr. SOMERVILLE. None whatever. We are in the business of forwarding household goods, consolidated for the purpose of shipment. We have a good many shipments coming from the West to the East, where we redistribute in Chicago, and were it not for the existence of the rule, we might take advantage of the privilege of sending forward in carloads.

Mr. SLUSSER. What do you do with those goods?

Mr. SOMERVILLE. Ship them L. C. L.

Mr. SLUSSER. At owner's risk, or yours?

633 Mr. SOMERVILLE. Well, we have to ship them at the owner's risk, of course.

Mr. SLUSSER. Are you interested in any other commodity, or in any commodity that ships from the West into Official Classification territory?

Mr. SOMERVILLE. Do you mean by that question to pertain to my forwarding business?

Mr. SLUSSER. No; outside of that.

Mr. SOMERVILLE. Yes; I am. I am an orange grower.

Mr. SLUSSER. Where?

Mr. SOMERVILLE. At Redlands, San Bernardino County, California.

Mr. SLUSSER. You have an orange orchard or ranch, do you?

Mr. SOMERVILLE. About a ten-acre ranch.

Mr. SLUSSER. Do you know how you and your associates who are in the orange-growing business are able to reach the eastern market through what instrumentality at the present time?

Mr. SOMERVILLE. Through the instrumentality of an association known as the "Redlands Orange Growers' Association."

634 Mr. SLUSSER. Are you a member of that association?

Mr. SOMERVILLE. I am not; only in so far as they solicit and I tender to them my annual product for shipment.

Mr. SLUSSER. You make use of that association for the purpose of reaching your market, is that it?

Mr. SOMERVILLE. Yes.

Mr. SLUSSER. Who is it that sells your product?

Mr. SOMERVILLE. The association, through their agents.

Mr. SLUSSER. You sell them to jobbers on the ground, or do you, through this association, reach the consumer?

Mr. SOMERVILLE. The association, as an association, acts in precisely the same capacity, to all intents and purposes, as a forwarding company. They do not buy anything from the grower. The different growers deliver their goods to the association, and they sort them, classify them, pack them, and ship them, and consign them to certain delivering agents, and they are delivered in that way to their customers.

635 The CHAIRMAN. It is hardly necessary to go into that. The

Commission has had occasion to go very thoroughly into the method of shipping oranges in California.

Mr. SLUSSER. I want to say in this connection, if your honors please, that these goods are shipped in the name of the association, consigned by them to themselves as consignee, or to their distributing agent, into this territory, and that it is being done in thousands of carloads at this time, although it is in contravention of this note to Rule 5-b, and that the railroad companies recognize that practice by the orange growers, and as a matter of commercial necessity, and we urge that for the purpose of showing the unreasonableness of the rule which these railroads are trying to enforce.

Mr. SOMERVILLE. The enforcement of the rule would prevent the carrying on of the orange-growing business.

Mr. SLUSSER. For the reason that you could not reach your customers?

Mr. SOMERVILLE. Because we could not reach our customers and because all the goods shipped are the property of different owners.

The CHAIRMAN. That covers the point. There is no need to go into details.

636 Mr. SLUSSER. That is all right.

The CHAIRMAN. It would be entirely proper to show the fact, and take his opinion of what the effect would be if this note to Rule 5-b applied to that traffic and should be enforced.

Mr. SLUSSER. I will ask you what the effect of it would be if it was enforced, if these shipments had to be made L. C. L.

Mr. SOMERVILLE. It would prevent us getting the benefit of the carload rate, which is the only rate in effect.

Mr. JENNEY. Is he giving his opinion as a lawyer or as a layman?

Mr. SOMERVILLE. I am giving my opinion as an orange grower and shipper.

Mr. SLUSSER. What effect would that have upon the market, and would you be able to sell?

Mr. SOMERVILLE. It would destroy the market and it would necessitate every grower selling his product to a buyer or jobber who would come there and offer, and they would be required to accept almost any price which the buyer cared to offer, so that the enforcement of this rule would practically destroy the business of the orange grower.

637 Mr. SLUSSER. Precisely so.

The CHAIRMAN. There is no L. C. L. rate on oranges, is there?

Mr. SOMERVILLE. None whatever.

The CHAIRMAN. It is entirely a carload proposition?

Mr. SOMERVILLE. Yes.

Mr. SLUSSER. That is all.

Cross-examination:

Mr. JENNEY. I want to ask this question: During the last two years have you quoted the same rate to all shippers? You know what I mean by the question.

Mr. SOMERVILLE. Quite so. I have intended to. I could not swear that we have—I have intended to.

Mr. JENNEY. Well, now, is that entirely frank?

Mr. SOMERVILLE. Yes; I intend to be perfectly frank.

Mr. JENNEY. What I mean is this, when you get almost a car load and you wanted to get just enough more furniture 638 to make a carload and get a car out, is not that a temptation to you to quote a less rate than the rate you would quote to start a car with?

Mr. SOMERVILLE. There is no such temptation, for we always have more stuff to ship than we have means to ship it. At least, that has been the fact up to the last few weeks, and at no time have we ever offered a reduced rate for the purpose of filling a car.

Mr. JENNEY. You are in competition with the Export Shipping Company, are you not?

Mr. SOMERVILLE. We have never noticed the existence of them as a competitor.

Mr. JENNEY. They are not, then, in the furniture business?

Mr. SOMERVILLE. That is true.

Mr. JENNEY. You are not engaged in the machinery business?

Mr. SOMERVILLE. No, sir.

Redirect examination:

Mr. SLUSSER. Do you know whether orange growers in Colorado sell their oranges in auction lots?

639 Mr. SOMERVILLE. You mean in California?

Mr. SLUSSER. No; I mean in Colorado.

Mr. SOMERVILLE. I do not know anything about the orange business in Colorado.

G. H. BUNGE, a witness of lawful age, called by and on behalf of the intervenors, after being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside, and what is your business?

Mr. BUNGE. I live in Chicago, Illinois, and am the general manager and president of the American Forwarding Company.

Mr. SLUSSER. What is the American Forwarding Company?

Mr. BUNGE. A firm organized for the purpose of warehousing, forwarding, and shipment of new furniture, household goods, and machinery.

Mr. SLUSSER. How long has it been in business?

Mr. BUNGE. For about eight years.

640 Mr. SLUSSER. Is it a corporation?

Mr. BUNGE. Yes.

Mr. SLUSSER. Have you ever had any practical experience as a railroad employee?

Mr. BUNGE. Twelve years.

Mr. SLUSSER. In what capacity?

Mr. BUNGE. I worked for the Santa Fe, the C., B. & Q., and Alton as a freight agent at various points.

Mr. SLUSSER. Do you know the local conditions under which goods are shipped L. C. L. and C. L.?

Mr. BUNGE. Yes.

Mr. SLUSSER. In what territory is your company at present operating?

Mr. BUNGE. In the territory west of Chicago. We are receiving business from east of Chicago, but only for distribution.

Mr. SLUSSER. You are not shipping that freight?

Mr. BUNGE. No, sir.

Mr. SLUSSER. Why not?

Mr. BUNGE. Because we are prohibited by the enforcement of the footnote to Rule 5-b.

641 Mr. SLUSSER. But for that, would you expect to operate in that territory?

Mr. BUNGE. Yes.

Mr. SLUSSER. How are less than carload shipments of the commodities which you handle handled by the railroads? Can you give a brief statement of how the railroad companies handle it as regards to the manner of handling them, and the time in which they go forward, as well as the rates?

Mr. BUNGE. Do you mean, in my opinion as a railroad man, how are the railroad companies handling L. C. L. shipments and carload shipments?

Mr. SLUSSER. Yes.

Mr. WILSON. I think we will have to object to that on behalf of these special defendants.

The CHAIRMAN. What do you mean by how do they handle them?

Mr. SLUSSER. As to the manner in which they handle them, the condition in which they are handled, the time in which they are

handled, and all the questions that go into the manner of moving and handling L. C. L. traffic; I think those are pertinent to this issue and should go into the record.

642 Mr. WILSON. Those are purely local conditions that would not affect us.

Mr. SLUSSER. I think he will be able to state them in a general way, so that there will not be that objection. Conditions are not different in your territory from what they are in his territory.

Mr. WILSON. You have not shown that. We do not know.

Mr. SLUSSER. I think the presumption would be that it is not. You might show that conditions were different, but I don't think you could.

The CHAIRMAN. State in a general way, and briefly. Those are questions we do not need to go into in this case.

Mr. BUNGE. L. C. L. shipments as a rule are received at the freight houses at the terminal stations.

The CHAIRMAN. Every member of this Commission is just as familiar with that as can be. We know how less than carload freight is received, how it is loaded, forwarded and handled by the railroad agents, and carload freight is loaded by the consignor and unloaded by the consignee.

643 Mr. SLUSSER. Speak of the condition in which it goes through, from your experience, and the time in which it is handled.

Mr. BUNGE. From my experience as a railroad man, L. C. L. shipments to the Pacific coast, as a rule, are from four to eight weeks in transit, and especially on shipments of household goods; and taking furniture and other fragile articles, 75 per cent of those L. C. L. shipments going to the Pacific coast or to points west of the Colorado common points, are damaged.

The CHAIRMAN. Is it worth while to go into that? This consolidation is permitted at Chicago and on these transcontinental lines.

Mr. SLUSSER. That is true.

The CHAIRMAN. Is it a question whether the denial of that privilege in the classification territory is a violation of this law?

Mr. SLUSSER. It seems to me the larger question is whether or not the western railroads would be compelled to adopt that same classification and to deny that privilege; because it does involve an interpretation of the interstate-commerce act. It is either

644 discrimination on the part of the railroads to prevent consolidation of cars, or else it is discrimination to permit it, and it seems to me that it involves the traffic movement of the whole country, and on that basis I think this testimony is competent.

Mr. JENNEY. As I understand, we are only trying out the Official Classification here, whether it is discrimination. Whether it is discrimination for the railroads not to have that rule can be tried out in some other case.

Mr. SLUSSER. No; we have got to consider what will be the effect if the Commission puts that interpretation on the rule, it seems to me

Mr. JENNEY. I don't know why you should say that, under the decision in the Buckeye buggy case.

Mr. SLUSSER. I will try to make myself clear, if your honor will permit me. In the Buckeye buggy case the only question that was involved there was whether or not goods could be tendered to the railroads that were sold F. O. B. the cars at Columbus, Ohio, and shipped in carload lots, where the ownership became invested 645 in the consignee upon delivery to the railroads, so that there

was but one ownership in transit. That was the only question that was involved. It was held by the Commission that they had a right to do that, and that those goods should go C. L. The question of the reasonableness of the rule, or the right to make consolidation of cars either through a forwarding agent and shipped in his name, or by several owners, was not passed upon. It was discussed to some extent but not passed upon at all. As I think, the situation is this: Second section of the act provides that goods, merchandise, and passengers; that there shall be no discrimination on the part of the railroads where they perform a contemporaneous service, in a like traffic, in the carriage of passenger or property under substantially similar circumstances. Now, if "substantially similar circumstances" is held to mean the condition of carriage, the physical condition of sending a car forward from the forwarding station to the point of distribution, without regard to the ownership at all, and eliminating 646 absolutely the question of the consignor or the consignee, as to whether they are the owners or not, or whether there is a combined ownership, it seems to me that if the Commission should hold that that thing is permitted, that the railroads may make that discrimination; or, in other words, may enforce the note to Rule 5-b, then they have practically said it is a discrimination for any railroad to permit the consolidation and to charge C. L. rates; that it is a discrimination against the shipper who is not able to avail himself of that.

The CHAIRMAN. That is, do you mean, Judge, that if the Commission should hold that this note to Rule 5-b is not unlawful in Official Classification territory where that rule applies, that then it would follow that the practice which is allowed in Western Classification, of permitting consolidation, is unlawful?

Mr. SLUSSER. That is it exactly.

The CHAIRMAN. Well, the Commission has just held this proposition in Official Classification territory, that any shipper may consign two articles that take the same rate and get the carload rate on them.

Mr. SLUSSER. True.

647 The CHAIRMAN. In Southern Classification territory he can not do that. We have just held that it was not unlawful for the carrier to refuse that in Southern Classification territory.

Mr. SLUSSER. That is a somewhat different proposition, it seems to me.

The CHAIRMAN. It is not the identical proposition, but if the carriers may lawfully refuse to allow the same shipper to ship two differ-

ent articles that take the same rate, and get the carload rate on them, would it not follow that it was unlawful for the carriers to allow that privilege in Official Classification territory?

Mr. SLUSSER. Not quite so, no; because the shippers in that territory are exactly on the same basis, and what they refused to one shipper they would have to refuse to another shipper, and what they would permit to one shipper they would have to permit to another shipper; but where in one territory they allow consolidation of shipments in the same car at carload rates, it is giving to the several owners of those consolidated articles the advantage of carload rates, which would be a discrimination as against the man who can not get the carload rate.

if the footnote to Rule 5-b is upheld, it seems to me; but, on the
648 other hand, if it is held that that is discrimination—in other words, that the "circumstances and conditions," as used in the second section of the act, relate to the conditions of carriage only, then the question of ownership is not involved, and it does not make any difference who owns the goods, and no matter how many owners there are, they must accept combined carloads, and that was the interpretation of the second section of the act throughout the entire country—

The CHAIRMAN. Then the rule must be uniform everywhere?

Mr. SLUSSER. That is what I think.

The CHAIRMAN. I think I appreciate your point of view, and you may show any fact which will enable you to argue the question from that point of view when we come to argue it, but do not go into details about it.

Mr. WILSON. Have you considered the effect of the word "person" in section 2 of the act—the service tendered to "person or persons?"

Mr. SLUSSER. Yes.

Mr. WILSON. Does not that modify your contention?

Mr. SLUSSER. I do not think so.

649 Mr. WILSON. Does it not recognize the ownership of property as being a factor recognized by the act?

Mr. SLUSSER. I do not think so.

Mr. WILSON. Section 2 does not provide that you must not discriminate between a certain amalgamated lot of goods.

Mr. SLUSSER. "Persons" may relate to the passenger traffic and not to the freight traffic.

Mr. WILSON. Do you mean that section 2 only relates to the passenger traffic?

Mr. SLUSSER. I did not say that. I mean that it relates to that as well as to the freight traffic.

The CHAIRMAN. Let us see what question he wants to ask the witness.

Mr. SLUSSER. You may state what kind of commodities your house handles for shipment L. C. L. in combined carloads.

Mr. BUNGE. We are handling new furniture, household goods, and machinery.

Mr. JENNEY. He stated that.

The CHAIRMAN. Yes.

Mr. SLUSSER. To what points of shipment do you make
650 those?

Mr. BUNGE. They are being shipped westbound to points
west of Chicago.

Mr. SLUSSER. Do you receive any goods for shipment eastbound
at all?

Mr. BUNGE. We do not.

Mr. SLUSSER. Because of the enforcement of this rule, I think you
said that yours were received from the east L. C. L. shipments.

Mr. BUNGE. L. C. L. shipments for consolidation at Chicago.

Mr. SLUSSER. Will you state to the Commission what your experience
has been as to the manner in which carload shipments go
through?

The CHAIRMAN. He has stated that. So far, it stands undisputed
that carload shipments move more rapidly than less than carload.

Mr. SLUSSER. There is one question which I think is not cumulative: In case of loss or damage of goods in transit, what has been
your experience as to whether the claim for damages against the
railroad is made by your company for the various owners, or
651 whether it is made against the railroad company by the several
owners individually?

Mr. BUNGE. In the matter of assembled carloads, the claims of the
individuals interested in the particular car are sent to our general
office and there they are assembled and put into one claim and then
filed by our claim agent with the carrier, by whom the bill of lading
is issued to us.

The CHAIRMAN. If the claim is allowed, to whom is the payment
made?

Mr. BUNGE. It is paid to the forwarding company on account of
their holding the bill of lading, and settlement is made with us.

Mr. SLUSSER. You are recognized as the contracting party?

Mr. BUNGE. Yes.

Mr. SLUSSER. And you make settlement with the individual shippers?

Mr. BUNGE. Yes.

Mr. SLUSSER. Has that been your uniform practice?

Mr. BUNGE. Yes.

The CHAIRMAN. Are you required in any way to indemnify
652 the railroad against suits which may be brought by the
owners?

Mr. BUNGE. We have a bond with several roads, that by means
of that bond they are paying our claims before investigation, and if
it develops that after investigation that the claim is not right or fair
in some particulars, we refund the money. With some roads we have
no bond.

Mr. SLUSSER. State, from your knowledge as shipper and forwarding agent, and also from your knowledge as a railroad man,
whether any more difficulty is experienced, so far as the railroad com-

pany is concerned, in adjustment and payment of the claims of consolidated cars than cars under one ownership.

Mr. BUNGE. I do not know of any. Our claim agent is particularly trained in that line. He gets all the papers necessary for the proper adjustment of the claim, and turns them over to the claim agent of the railroad, thus, in my opinion, avoiding considerable expense and time on the part of the claim department of the railroad in getting together the necessary papers and necessary information.

Mr. SLUSSER. How are cars loaded by your company?

653 Mr. BUNGE. They are sent to our warehouses—

The CHAIRMAN. Do not go into that, unless there is something peculiar in their method of loading.

Mr. SLUSSER. I want to show, and I think it is proper, something that has not been developed at all. I want to show the equipment of the forwarding agents in Chicago for handling the business, where the business is recognized, and the advantage to the commercial interests of the country which make use of it, and also the matter of convenience to the railroad.

The CHAIRMAN. Be very brief about it, because that has, to my mind, only the most remote bearing upon any question here.

Mr. SLUSSER. Will you state briefly the equipment which you have for the handling of this business, and how it is handled through your equipment?

Mr. BUNGE. We own a large warehouse at Chicago Heights, Illinois, connected by switch tracks with the various railroads, and by the line entering that city, and we are using warehouses we lease from the Atchison, Topeka & Santa Fe, the Rock Island, and the Great Western Railroad.

654 Mr. SLUSSER. Are the cars sent up to your warehouses by the companies?

Mr. BUNGE. Yes.

Mr. SLUSSER. In loading the cars, do you wait for the assembling of the goods?

Mr. BUNGE. No; we always have the goods in the house, assembled, before any cars are ordered. During the past three years we have had our house full to the top waiting for cars.

Mr. SLUSSER. Tell us about your charges to the customers, whether they are uniform or otherwise, and upon what you base those charges?

Mr. BUNGE. We have a regular schedule for our transfer charges and our warehouse or loading charges on new furniture, and also on machinery.

Mr. SLUSSER. What are your charges?

Mr. BUNGE. We charge ten cents per hundred pounds for transferring goods from one freight depot in Chicago to our freight house; that is, new furniture; and we charge from seven to eight cents per hundred pounds for loading; eight cents for the lighter and bulkier articles and seven cents for the heavier articles.

Mr. SLUSSER. Do you make different prices to different people, or are your charges uniform?

55 MR. BUNGE. Our charges are uniform as long as the tariff remains in effect, the transfer and loading tariff.

Mr. SLUSSER. How do they compare with other companies, as to being the same or otherwise?

MR. BUNGE. About the same, as far as I know.

Mr. SLUSSER. About how many forwarding companies are there now operating in Chicago?

MR. BUNGE. There is the Judson Freight Company, the Trans-continental Freight Company, the Alfred H. Post Company, the Bekins Household Shipping Company, our own company, the Joseph Stotts Company are doing considerable of that work; the Arthur Dixon Company are also, I believe, doing some considerable, and the Export Shipping Company doing the same.

Mr. SLUSSER. Have you any original receipts or bills of lading in your possession showing the basis of the charges?

MR. BUNGE. We have a great many.

Mr. SLUSSER. Some that have actually been issued and used?

MR. BUNGE. Yes; hundreds of them.

556 Mr. SLUSSOR. Similar receipts to those spoken of by Mr. Wood, the traffic manager for the Otis Elevator Company?

MR. BUNGE. Yes.

Mr. SLUSSER. Have you any with you here?

MR. BUNGE. I have not.

Mr. SLUSSER. Will you kindly furnish and file as a part of your testimony some of these original bills of lading or receipts?

MR. BUNGE. Yes; as many as you want.

Mr. SLUSSER. If counsel on the other side will indicate.

Mr. JENNEY. I wanted the Otis Elevator Company. I do not care anything about this.

Mr. SLUSSER. I will ask the privilege of filing them.

The CHAIRMAN. Yes; or produce some of them on the argument for inspection. You settle with the railroad company, I suppose, and the shipper pays the whole sum to you?

MR. BUNGE. It depends on the class of traffic. We are getting out a great many cars for large dealers, and we ship direct for them; and then in Kansas City or some other large towns the managers of the shippers indicate whom they want to use down there as 657 signee. We simply consign a car to him, and we assess our loading and transfer charges, and the distributor distributes the freight charges, as I understand it, and adds our loading and transfer charges to it.

Mr. SLUSSER. What would be the effect on the business of shipping commodities, either through forwarding agents, or others, if the note to Rule 5-b was enforced in the western territory?

MR. BUNGE. It would put us out of business. It would affect about 60 per cent of our business.

Mr. SLUSSER. What effect would it have on the owners of the goods that have the goods for shipment?

Mr. BUNGE. It would have this effect, that in the far West the dealers, especially in the line of furniture such as we handle, would not be able to purchase in the eastern market. They would not be able to purchase as they do now at Grand Rapids, Chicago, Rockford, Indiana, and Ohio, where a great deal of furniture is manufactured. The result would be that the business in the territory west of Colorado common points would be thrown into the hands of local jobbers,

thus concentrating the business at that end of the line, just as
658 the argument made by the honorable chairman would, in New York City. That would be the reverse of it; because the L. C. L. rate on new furniture from Chicago to the Pacific coast runs from \$2.60 to \$9 a hundred. The mixed carload rate is \$2.20.

The CHAIRMAN. It is not necessary to go into all those figures as to the details.

Mr. SLUSSER. The effect would be to eliminate the western purchaser from the market?

Mr. BUNGE. It would.

Mr. SLUSSER. From the eastern market entirely?

Mr. BUNGE. It would—in this particular line—furniture.

Mr. SLUSSER. In your opinion as a railroad man and as a shipper, would the net earnings of the railroads be lessened or decreased, or are they decreased, by the permission in the western territory to ship these consolidated cars?

Mr. BUNGE. I do not think they are decreased as far as these particular commodities are concerned.

Mr. SLUSSER. Why?

659 Mr. BUNGE. Because the freight is easily broken, easily injured, and the claims for damages as a rule offset the earnings in revenue that the company might get out of it.

Mr. SLUSSER. Can you give a case, under the commercial conditions that now exist in the country, where the enforcement of Rule 5-b would be discrimination?

Mr. BUNGE. Yes; I can.

Mr. SLUSSER. State it.

Mr. BUNGE. For instance, a shipment arising at Grand Rapids would illustrate the case exactly in point. In my own experience we are assembling goods at Chicago, new furniture for Moslet, Bowen & Cook, of Mexico City, who are buying large quantities of furniture at Grand Rapids, which furniture is shipped to us at Chicago for the purpose of loading into cars for the City of Mexico. We have had two cars which contain 13,000 pounds, somewhat above the minimum required under the Official Classification. The goods were loaded necessarily at Grand Rapids by a transfer company, the Columbian Transfer Company, and shipped to us at Chicago for forwarding to the City of Mexico. In this case neither the consignor

660 nor the consignee was the owner of the property, but the ownership of the entire cargo was vested in one person, and the rates had been set up to less than carload rates on account of

either the consignor nor the consignee being the owner of the property.

Mr. SLUSSER. Under the conditions that existed, could these goods have been shipped in the name of the owner?

Mr. BUNGE. They could not.

Mr. SLUSSER. Why not?

Mr. BUNGE. Because the C. L. minimum weight from Chicago to the City of Mexico is 22,040 pounds, and they bring those goods to Chicago and assemble them with others in order to get the advantage of the C. L. carload minimum and the carload rate.

Mr. SLUSSER. Do you know whether or not there are any commodities now shipped by manufacturers or other shippers that are of such a nature as to make it impossible for such manufacturer or shipper to load the minimum weight, as such minimum weights are now established by the railroads of this country, into a car?

Mr. BUNGE. I do.

Mr. SLUSSER. What are they?

Mr. BUNGE. Upholstered furniture, rattan goods, and cane-seated chairs.

661 Mr. JENNEY. I suppose that involves an attack upon the minimum?

Mr. SLUSSER. Not at all. It shows that if a consolidation was permitted with other owners, that heavier goods could be placed in the car, of such kind and character as would be permitted to be shipped in the same car, at C. L. rates, if the ownership was vested in one person. Therefore it becomes a matter of great commercial convenience.

Mr. JENNEY. That is quite a different question.

Mr. WILSON. That is not the way to get at a correct minimum on a particular article. Your roundabout method is not the method for that.

Mr. JENNEY. If the minimum is too light, it ought to be attacked directly, in an effort to correct it, and not in this roundabout way.

Mr. SLUSSER. I do not think it is a roundabout way. If consolidated cars were permitted, the minimum would be all right, because you could put in heavier articles and make the shipment.

The CHAIRMAN. That would depend whether heavier articles were produced at the same point, in connection with the lighter 662 articles. It might be the case or might not be the case.

Mr. SLUSSER. I will ask him whether he knows of such circumstances, where these shipments are made in the western territory, and would be made to the eastern territory, except for this rule.

The CHAIRMAN. He may answer that.

Mr. BUNGE. I do.

Mr. SLUSSER. State what.

Mr. BUNGE. At Chicago we have a number of manufacturers manufacturing upholstered furniture, chairs, and rattan goods, and combining heavier goods, such as we call coarse goods, for the purpose of completing their carload.

The CHAIRMAN. Then, what would the fellow do at some other point where there were no heavy goods manufactured?

Mr. BUNGE. He would ship them to Chicago.

The CHAIRMAN. He would have to pay the local rate in addition wouldn't he? He would be handicapped that much?

Mr. BUNGE. He would be handicapped that much, that he would pay his local rate to Chicago, and then the carload rate from there on.

663 Mr. SLUSSER. Do you make those combinations now?

Mr. BUNGE. Yes.

Mr. SLUSSER. For shipments west?

Mr. BUNGE. Yes.

Mr. SLUSSER. But are not able to do it in the eastern territory?

Mr. BUNGE. No, sir.

Mr. SLUSSER. Can you name some of them who are doing it?

Mr. BUNGE. The National Furniture Company, the Naperville Lounge Company, Fenster Brothers, and others.

The CHAIRMAN. What is the difference between the carload rate and less than carload rates on new furniture Chicago to New York?

Mr. BUNGE. Chicago to New York, I am not able to say. It runs from fourth class to three times first class, according to the kind of furniture.

The CHAIRMAN. I ask you for the difference between carload and the less than carload rate, then, going to compete with the big dealer?

Mr. BUNGE. I am not posted on the eastbound rate; I don't know.

Mr. SLUSSER. Are you able to state any other way in which 664 the note to Rule 5-b of the Official Classification is an unjust discrimination—any way that you have not already stated?

Mr. BUNGE. No; I do not know of any other.

Mr. SLUSSER. It does prevent smaller dealers from getting the benefit of the rate that is enjoyed by the larger concerns, does it not?

Mr. BUNGE. Yes.

The CHAIRMAN. How is the smaller manufacturer, who has to pay the less than carload rate, then, going to compete with the big dealer?

Mr. BUNGE. I can only speak in reference to the freight lines to which my experience is limited. Take it on the question of new furniture, the furniture factories are practically concentrated at a few points—Jamestown, New York; Grand Rapids, Michigan; Chicago and Rockford; and then we have quite a number in Indianapolis. Now, these factories assemble among themselves. I am of the opinion that at least 75 per cent of the new furniture is assembled among the factories themselves, irrespective of the intervention of any forwarding company, and I believe that, although we are loading more cars of new furniture than any other similar concern, probably

in Chicago, I do not believe we receive more than ten per cent, and possibly not more than five per cent, of the business that comes out of that particular territory.

The CHAIRMAN. You do not quite get my point. Here is a man who makes furniture up at Syracuse. He has to pay the less than carload rate to Buffalo, if you please.

Mr. BUNGE. That is true, but—

The CHAIRMAN. He would be put to great disadvantage, would he not, by the application of the rule for which you contend?

Mr. BUNGE. He would be put to the disadvantage that he would have to pay the rate up to the first consolidation point, wherever that might be—the first point of assembling.

The CHAIRMAN. The furniture manufacturer would have to locate with reference to the forwarding agent who could get this combination for him?

Mr. BUNGE. That is very true. At the same time, small dealers do not have to locate where the furniture factories are. The effect of this would be—I have been managing a jobbing business for five years in connection with this business. Prior to the assembling of 666 these carloads, the condition was that the dealers in California,

Washington, Oregon, Idaho, Utah, Colorado, and all those points had to depend on the local jobbers, either in Salt Lake City or Denver, or Portland, or Seattle, or San Francisco. It was impossible for the local dealer to buy in the eastern markets, thus preventing interstate business. As a rule the people in Utah could buy of a jobber in Salt Lake, and the eastern jobbers were forced to sell to him in order to make a sale in that territory at all. It localized the business out in that territory. Since this loading business has come in vogue, these dealers throughout the West are buying in the eastern markets, Grand Rapids or Chicago, and, in fact, any other eastern market as far east as New York.

Mr. WILSON. In other words, the forwarder has taken the place of the jobber?

Mr. BUNGE. Not exactly, but to some extent he might.

The CHAIRMAN. If this is allowed in the case of furniture and machinery, it should be allowed in the case of canned goods and groceries, should it not?

Mr. BUNGE. Why, I am not prepared to say that.

The CHAIRMAN. Why not?

667 Mr. BUNGE. I am not in those lines.

The CHAIRMAN. Do you know any reason?

Mr. BUNGE. Yes; I do. There are a number of reasons why. In the first place, a shipment of furniture can not be shipped L. C. L. from Chicago to the far West, to points west of Colorado. The experience has been that it arrived demolished.

The CHAIRMAN. I am speaking of some reason under this law, and I am thinking of some rule which this Commission could establish. Can we say that this consolidation may be made in the case of furniture, because of the risk of shipping it L. C. L., and deny the consolidation to the men who ship groceries or hardware?

Mr. BUNGE. That is to some extent a legal question and a question of fact combined. I believe it would be reasonable from one point of

view; that is, where the commodity is of such a nature that it can not be transported with safety a long distance. Some consideration should be given to those facts; whereas in the case of other articles, like canned goods, the rate is a great deal lower, and the question of damages is decreased at least 75 or 80 per cent.

668 The CHAIRMAN. Have you stated what you get on this furniture?

Mr. BUNGE. I stated that in my testimony.

Mr. SLUSSER. What, from your experience in the jobbing and brokerage business, would be enforcement of the note to Rule 5-b to the Official Classification have upon the smaller shippers and dealers throughout the country, in your opinion?

Mr. BUNGE. I think I stated that to some extent in the answer to the last question.

The CHAIRMAN. That seems to be a question of argument.

Mr. SLUSSER. Witnesses and counsel on both sides have been arguing this question more or less.

Mr. BUNGE. The effect would be this, that the dealers throughout the West would have to buy of the local jobbers; that they would be barred from the markets of the Central States and Eastern States. That is one reason why the jobbers out West are against us on this proposition.

The CHAIRMAN. You have no idea that the shippers in the small towns in the West would favor this proposition?

669 Mr. BUNGE. I do not think so.

The CHAIRMAN. If the railroads should make the change out there, don't you think this Commission would have plenty of complaints right away?

Mr. BUNGE. Not through the West, because the conditions are not affected there yet. But if they would be, then of course you would.

Mr. SLUSSER. They are permitting consolidations of shipments in the West already.

The CHAIRMAN. Oh, to an extent.

Mr. SLUSSER. To as great an extent as we ask for.

Mr. WILSON. It might go to other lines of goods, where there are jobbers now in business.

The CHAIRMAN. Surely.

Mr. SLUSSER. The Western Classification makes no discrimination between assembled cars, consolidated cars, and cars under straight ownership, as I understand it.

Mr. WILSON. It allows assembled cars in some few lines of traffic; that is all.

Mr. SLUSSER. In your opinion, do railroad companies perform any greater service in the transportation of consolidated cars, so called, than in the straight car?

Mr. BUNGE. They do not.

670 Mr. SLUSSER. Is the railroad equipment in such case any longer in service?

Mr. BUNGE. It is not as long in service as are most of the cars loaded by owners. I speak from the Chicago point of view.

Mr. SLUSSER. How many cars does your company ship, or did it, in the last year?

Mr. BUNGE. We have shipped so far 1,100 cars this year.

Mr. SLUSSER. Have you ever known of a car or has any car you have shipped ever been stopped in transit by any creditor of any of the various owners of the assembled goods?

Mr. BUNGE. No, sir. I might add that in my experience as manager of the forwarding company we have handled, since the date of our beginning to the present time, probably a few more than 8,000 cars, and I only know of one case where a car was stopped in transit during all that time, and I only know of one suit that was brought by an individual who was interested in any one of those cars against the railroad company.

671 Mr. SLUSSER. Were you joined as a party in that suit?

The CHAIRMAN. Do not go into that, please.

Mr. SLUSSER. That is all, unless you think of some other fact you want to bring out.

Mr. BUNGE. I do not know of any other fact that I think is very material, because the whole record shows this point very strongly—the evidence brought out by the defendants.

Mr. SLUSSER. The point was contended for at the other hearing that they were subjected to great risk and burden.

The CHAIRMAN. The fact that out of 8,000 carloads only one suit has arisen is the important fact, and that you have already. What that suit was about is not of the slightest consequence.

Cross-examination:

Mr. WILSON. I understood you to say that of 8,000 carloads, one car was stopped in transit.

Mr. BUNGE. Yes.

Mr. WILSON. Where the purchaser had become insolvent?

Mr. BUNGE. Some creditor stopped it.

672 Mr. WILSON. How many cases of stoppage in transit do you suppose they are on railroads generally, with respect to general shipments, on account of the insolvency of the shipper?

Mr. BUNGE. I can say from my twelve years' experience as a freight agent for various railroads I only know of one, and that happened a good many years ago.

Mr. WILSON. I do not believe we have had one on the Baltimore & Ohio, and we have been shipping thousands of carloads every year. I do not believe we have had one case of stoppage in transit on account of the insolvency of the shipper. I was not clear as to just exactly who your customers are there in Grand Rapids and those other furniture centers.

Mr. BUNGE. We have no customers there. Our customers are out West.

Mr. WILSON. But the people whose shipments you send forward—the manufacturers.

Mr. BUNGE. The goods are all owned by people out West, who have given the factories instructions to ship them to us; so that we are dealing with the western public. We are receiving shipments from nearly every furniture factory in the East.

673 Mr. WILSON. Who are the people in the West who are your customers?

Mr. BUNGE. Furniture dealers throughout the West.

Mr. SLUSSER. Local dealers?

Mr. BUNGE. Yes; local dealers and jobbers. We serve both.

Mr. WILSON. Do not these local dealers in the West buy from these furniture houses at Grand Rapids and other points?

Mr. BUNGE. That is what I just said.

Mr. WILSON. Who are these furniture dealers at Grand Rapids and so on whose shipments you consolidate on orders from your western customers?

Mr. BUNGE. We receive shipments from every factory in Grand Rapids.

Mr. WILSON. So this plan of yours is not only used then by the smaller furniture manufacturers, but every furniture manufacturer in Grand Rapids, large and small, participates in them?

Mr. BUNGE. Oh, yes; they do not sell enough goods to one man to load one car. At some time or another we receive goods from all, large and small.

Mr. WILSON. Let me ask you one other question: There are quite a number of forwarding businesses in Chicago, are 674 there not?

Mr. BUNGE. Yes; a large number.

Mr. WILSON. How many would you say altogether?

Mr. BUNGE. I believe there are seven or eight.

Mr. WILSON. Are they all represented here?

Mr. BUNGE. No; I think there are only five of them represented here.

Mr. WILSON. Do people sometimes go into that business and try it awhile and go out again, as in all other business?

Mr. BUNGE. Yes.

Mr. WILSON. You have cut rates to meet occasionally?

Mr. BUNGE. No; I can not say that we have. Some people start in and work for a month or so. We do not pay any attention to them—that is, we never have.

Mr. WILSON. I do not mean to say that you cut on yours, but there are people that go into the business that cut rates, are there not?

Mr. BUNGE. I presume there are, like in any other line of business.

Mr. WILSON. Want to get the business and get a start?

675 Mr. BUNGE. Want to get a start. We do not pay much attention to them.

Mr. WILSON. These small people who start in must make some inducement in order to get a start and get customers.

Mr. BUNGE. I presume they do.

Mr. WILSON. Are there not cut-rate people among your people as well as any other?

Mr. BUNGE. There are not among the companies that have been established for a number of years.

Mr. WILSON. In and out of the business?

Mr. BUNGE. Of course, the same as other lines, you could not eliminate them.

Mr. WILSON. You could not eliminate them?

Mr. BUNGE. No, sir.

The CHAIRMAN. There are six or seven of these well-established concerns.

Mr. BUNGE. There are about eight of us, your honor.

The CHAIRMAN. They have all been in business some time?

Mr. BUNGE. From five to eight or nine years.

Mr. WILSON. You agree about these prices, I suppose?

676 Mr. BUNGE. Yes; we do. The schedule is practically the same.

Redirect examination:

Mr. SLUSSER. These other concerns that counsel has talked about, do they cut any particular figure in the forwarding business?

Mr. BUNGE. Do you mean the Export Shipping Company?

Mr. SLUSSER. No; all these other concerns.

Mr. WILSON. I thought that was what was running in your mind.

The CHAIRMAN. Are not the carload rates on furniture to the Pacific coast the same from Grand Rapids as from Chicago?

Mr. BUNGE. They are the same.

The CHAIRMAN. Then, if this assembling could be done in the Official Classification territory, it would be done at Grand Rapids, and not at Chicago?

Mr. BUNGE. Yes; there would be a great deal more assembled there. There is some assembled there now, but there would be a great deal more assembled there.

677 The CHAIRMAN. That is to say, if this rule were eliminated, your furniture forwarding business would go to Grand Rapids, wouldn't it?

Mr. BUNGE. Oh, no; we claim that Chicago is the furniture center now, and not Grand Rapids any more. But we would lose some. Some would go there naturally, but not very much.

The CHAIRMAN. You are pretty well satisfied with the way it is now?

Mr. BUNGE. We are satisfied with the conditions now, as far as we are concerned in our business, but will not be satisfied—

The CHAIRMAN. Would you like to have this note to Rule 5-b eliminated?

Mr. BUNGE. As far as we are concerned, it is of very little moment to us in our business.

The CHAIRMAN. You are here to advocate that it be eliminated?

Mr. BUNGE. With this exception. I will modify that, that we receive a great many cars from Jamestown, New York, that have to be shipped to us L. C. L. now, which some years ago used to come carload, and the same would be the case from Grand Rapids. In that event we might be of more service to our customer at the other end, by giving him the carload rate between Grand Rapids and Chicago, and Jamestown and Chicago, and Shelbyville and Indianapolis, Ind., and the other furniture centers. It would be an advantage in that respect. Now they have got to pay the local rate as far as Chicago.

The CHAIRMAN. Of course any man who wants to do this business is practically dependent upon your agency or the agency of some of you people there in Chicago?

Mr. BUNGE. Oh, no.

The CHAIRMAN. He could not pay the L. C. L. rate, could he?

Mr. BUNGE. Oh, no; he could not pay that.

The CHAIRMAN. As a practical matter, he could not combine with other shippers except through the agency of some of you forwarding agents?

Mr. BUNGE. We are only performing about twenty-five per cent of the assembling in that particular line. The furniture factories themselves do that among themselves. We are only getting about twenty-five per cent of the forwarding in that line.

679 The CHAIRMAN. Then the assembling for the purpose of getting these carload rates would go on if the forwarding agent retired?

Mr. BUNGE. Just the same. It would not bother them; that is, as far as shippers are concerned, only such shippers as would rather have the forwarding company assemble the cars, for several reasons: First, the forwarding company, handling a large volume of business, they have trained men, and they do not do anything else but load that one particular commodity. They know how to load it in such a way as that it will go through without damage, and get more weight into a car, and oftentimes pay us more for that purpose. We are getting paid for loading cars where the consignee pays the absolute less than carload rate, where we make an arrangement with the through car service to the City of Mexico. The consignee pays us for the purpose of loading.

Mr. JENNEY. Do you use any one particular road more than another?

Mr. BUNGE. No; we do not.

Mr. JENNEY. These claims you refer to, are these furniture claims, some of them?

680 Mr. BUNGE. Yes.

Mr. JENNEY. I understood there were not any furniture claims where you people handled them. There are furniture claims, then, of considerable number for loss and damage, when you people handle them?

Mr. BUNGE. Of course there are claims, but the claims are very few considering the quantity of goods we are handling.

Mr. WILSON. You have a bond with the railroads, under which the railroads pay your claims without investigation? You have enough for that?

Mr. BUNGE. Those claims arising principally out of shipments of carload goods that come to us in L. C. L. shipments from Illinois territory and western territory, to go into cars, and especially the eastern territory worse than the western, as far as damages are concerned.

Mr. WILSON. What roads do you have these bonds with?

Mr. BUNGE. With the Rock Island and several other lines.

Mr. WILSON. Do they pay claims for damages in the East?

Mr. BUNGE. I do not mean to say that.

681 Mr. WILSON. I understood you to say that these damages that you said occurred were mostly damages that occurred under the L. C. L. shipments prior to coming to Chicago?

Mr. BUNGE. Yes; and we are getting a great many over the Rock Island, from Illinois points and some points in southern Iowa, L. C. L. to Chicago; getting tons of them every day.

Mr. JENNEY. Do you get any allowances, commissions, or payments of any name or nature from any of the roads?

Mr. BUNGE. We do not.

Mr. JENNEY. Free space, free warehouses?

Mr. BUNGE. No; we pay for the space.

Mr. JENNEY. Take your warehouse which you have on tracks out there, what do you pay for that? Is it a railroad warehouse?

Mr. BUNGE. No, sir; it is our own property. It cost us fifty-two dollars; we bought it last summer.

Mr. JENNEY. It is not located on railroad grounds?

Mr. BUNGE. It is located on our own ground, covering seven acres of switch tracks.

682 Mr. JENNEY. And the only concessions you get from the railroad companies, of any name or nature, are these bonds for payment?

Mr. BUNGE. That is the only thing.

Mr. JENNEY. That is all.

Mr. SLUSSER. The next witness whom I will call is not one of the parties whom I represent personally, but he desires to be heard.

The CHAIRMAN. Let him be sworn.

683 W. L. HINDS, a witness of lawful age, called by and on behalf of the intervenors, after being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside?

Mr. HINDS. Des Moines, Iowa.

Mr. SLUSSER. What is your business?

Mr. HINDS. Transfer and forwarding.

Mr. SLUSSER. Do you represent a company, or are you doing it yourself?

Mr. HINDS. A company.

Mr. SLUSSER. What is the name of your concern?

Mr. HINDS. The Merchants' Transfer Storage Company.

Mr. SLUSSER. To what points do you make your shipments?

Mr. HINDS. We are distributors more than receivers.

Mr. SLUSSER. Will you kindly state to the Commission how the enforcement of Rule 5-b affects your business, if at all?

Mr. HINDS. Well, it affects us this way: That we originally 684 received a great many shipments from the East in carloads to be distributed—tagged goods, what we call tagged goods sold before they left the factory. At the present time we are not receiving anything east of Chicago.

Mr. SLUSSER. To what extent does that affect your business?

Mr. HINDS. Cut out a couple of hundred cars a year.

Mr. SLUSSER. And that means a loss to you and to your customers as well?

Mr. HINDS. Yes.

Mr. SLUSSER. Is there any other fact you wish to bring out here in this hearing that has a bearing on this subject?

Mr. HINDS. The only thing is, if this Rule 5 should be applied to the Western Classification, it would ruin our business. We handled about 1,300 cars of this kind of commodities last year, and we are only one of five in our town. We are the third largest distributing point, I believe, in the United States. Therefore we would all have a good business.

Mr. SLUSSER. How would that affect your customers?

685 Mr. HINDS. We have not any direct customers. The customers are the various manufacturers that we handle the products for.

Mr. SLUSSER. How would it affect them?

Mr. HINDS. They would have to ship locally.

Mr. SLUSSER. Would that shut them out of the territory to some extent?

Mr. HINDS. It would shut out foreigners—what we call "foreigners," two or three hundred miles away. Of course Dubuque and Rock Island, the plow line of goods and the buggies manufactured there, it would give them the advantage over the eastern shippers.

Mr. SLUSSER. In other words, it would make the business in the territory in which you have been operating local business and would shut out the foreign competitors?

Mr. HINDS. Yes; what we call "foreign" competitors, eastern competitors.

The CHAIRMAN. Then should I infer that the operation of this rule has benefitted the manufacturers in your own State?

686 Mr. HINDS. It has benefitted our manufacturers in our own State, but it has shut out the Eastern States.

Mr. SLUSSEN. But it has had a tendency to lessen interstate commerce, has it not?

Mr. HINDS. Yes.

Mr. SLUSSEN. And the elimination of the rule would stimulate interstate commerce?

The CHAIRMAN. Judge, I asked that question for the purpose of reminding all these gentlemen of the other side of this question.

Mr. SLUSSEN. Yes; I appreciate that, your honor. I think that is all I desire to ask.

The CHAIRMAN. The manufacturers at half a dozen or twenty places in Iowa would not thank this Commission for holding that this rule in Official Classification territory was unlawful, would they? They say it is a just and beneficent rule, that gives them a fair chance to reach their own surrounding territory, into which they must pay less than carload rates, and not be driven out of it by the eastern dealers, who through this method can ship the goods in there on carload rates.

Mr. HINDS. Yes; then you know competition is the spice of life, and us Westerners like to see it come along.

687 The CHAIRMAN. To the fellow that gets the best bargain—

Mr. HINDS. I, representing five different companies, of course do not care to see that Rule 5 applied to the Western Classification, and if it should take effect in the East it would ruin our own business, and, as I say, we are the third largest distributing point in the United States.

Mr. SLUSSEN. Goods that formerly came from the East at carload rates were distributed at Des Moines, were they?

Mr. HINDS. Yes.

Mr. SLUSSEN. And then they pay the L. C. L. rates out?

Mr. HINDS. Local rates out.

Mr. SLUSSEN. The same as the local manufacturers?

Mr. HINDS. Yes.

Mr. SLUSSEN. I see. Then the eastern manufacturer not only had to apply L. C. L. rates, the same the local manufacturer, but he had to pay the carload rate from the point of manufacture East to the distributing point.

Mr. HINDS. Yes.

688 Mr. SLUSSEN. So that even at that he was at a disadvantage?

Mr. HINDS. The manufacturer in the East was on the same ground as the western manufacturer. He had to pay his local freight out of Des Moines.

The CHAIRMAN. Of course.

Mr. SLUSSEN. And his carload rate in?

Mr. HINDS. And his carload rate in.

Cross-examination:

Mr. JENNEY. I should like to ask, Mr. Hinds, about your prices out there. What do you charge your shippers for your services as forwarders?

Mr. HINDS. They vary according to the commodity.

Mr. JENNEY. Do they vary among you yourselves, or is there competition for business?

Mr. HINDS. No; on general commodities all over the United States it is done at practically the same price for handling such things as implements and buggies and various manufacturing commodities.

Mr. JENNEY. You forwarders there at Des Moines, don't you compete among yourselves, Mr. Hinds?

Mr. HINDS. No, sir.

689 Mr. JENNEY. Do not at all?

Mr. HINDS. We have more than we can do. There is no use competing and throwing away money when we have more business than we can take care of.

Mr. JENNEY. Why do not more people come into that business?

Mr. HINDS. I am telling a secret, and there may be some come in when they find this out.

Mr. JENNEY. What is your price? You forward from Des Moines to the Pacific coast, don't you, Mr. Hinds?

Mr. HINDS. Yes.

Mr. JENNEY. What price do you get on that?

Mr. HINDS. \$1.75.

Mr. JENNEY. That is a bigger price than they get from Chicago!

Mr. HINDS. We have to ship to Chicago and then reship again.

Mr. JENNEY. Can't you assemble the goods and get a rate out of Des Moines west?

Mr. HINDS. We can not get the rate out of Des Moines; no, sir. They discriminate against us when we are three hundred miles nearer.

690 Mr. JENNEY. They will not give you a rate from Des Moines to San Francisco as good as such stuff gets from Chicago?

Mr. HINDS. No, sir. We ship to Chicago and then reship there.

Mr. JENNEY. Do you assemble for shipment to Chicago?

Mr. HINDS. No, sir. All we get is the western roads. We do not attempt to. We are only three hundred miles from Chicago; it does not pay us to handle to Chicago.

Mr. JENNEY. You do not assemble any shipments for Chicago?

Mr. HINDS. No, sir.

Mr. JENNEY. Then all your shipments are assembled by you and then go east?

Mr. HINDS. Yes; practically—go east and then go west again.

Mr. JENNEY. Go east on the carload rate to Chicago?

Mr. HINDS. Yes.

Mr. JENNEY. And then go west from Chicago on a carload rate?

691 Mr. HINDS. Yes. It is a very small margin that we get.

Mr. JENNEY. Have you any business to anywhere else except the Pacific coast? Do you assemble for any other point except the Pacific coast?

Mr. HINDS. Seattle and San Francisco and the Pacific coast.

Mr. JENNEY. And your standard rate is \$1.75?

Mr. HINDS. Yes; \$1.75.

Mr. JENNEY. All of you charge that?

Mr. HINDS. All of us charge that.

Mr. WILSON. You are not in the business of distributing to local points in Iowa and so on?

Mr. HINDS. Yes.

Mr. WILSON. Where do those shipments come from?

Mr. HINDS. We get mostly from Wisconsin; that is our biggest territory in the manufacturing line, and Illinois.

Mr. WILSON. Trunk-line territory?

Mr. HINDS. Yes.

Mr. WILSON. Or Central Freight Association territory?

Mr. HINDS. Yes.

692 Mr. WILSON. And then from you to whom are the goods distributed?

Mr. HINDS. To the dealer in small lots, sometimes to the consumer. If it is from a catalogue house, it goes to the consumer.

Mr. WILSON. Is not the dealer ever in a position to ship from the eastern point in carloads himself?

Mr. HINDS. No, sir; very few of them are capable of doing that.

Mr. WILSON. For instance, a man who is in the buggy business would not buy in carload lots.

Mr. HINDS. He may buy a carload of buggies and they may come from four different places, by different roads, and fifteen different kinds of buggies.

Mr. WILSON. A man who was in the buggy business and carried any stock of buggies?

Mr. HINDS. Take a place like Marshalltown; they would buy a carload of buggies, but the intermediate points cannot afford to buy and carry a carload of buggies. A man at the county seat can buy a carload of buggies, but the other people at the smaller places cannot.

Mr. WILSON. This fellow at the county seat, who buys a carload of buggies, gets them at carload rates?

693 Mr. HINDS. Yes. Such shipments we make up from our warehouse, and then he pays locally—

Mr. WILSON. I mean he can ship through himself on carload rates.

Mr. HINDS. Yes.

Mr. WILSON. If he buys a carload of buggies and has them shipped at one time, he can have them shipped to him at carload rates?

Mr. HINDS. Yes.

Mr. WILSON. Is a carload of buggies very much to buy?

Mr. HINDS. It varies all the way from \$1,200 to \$1,800.

Mr. WILSON. Is there not a very large buggy business all through the South?

Mr. HINDS. We do not go below the Missouri line.

Mr. WILSON. Don't you know of that fact?

Mr. HINDS. Of what fact?

Mr. WILSON. That there is a very large buggy business in the South, from the Middle States, from manufacturing points in the Middle States?

Mr. HINDS. Yes.

Mr. WILSON. Moving to dealers on carload rates?

694 Mr. HINDS. Yes.

Mr. WILSON. No assembling at all is permitted in the southern territory, is there?

Mr. HINDS. I could not say as to that.

Mr. WILSON. And those people have all got to buy their buggies from the factories in carload lots, have they not?

Mr. HINDS. You say there is nothing allowed in Southern States. How far north do you mean?

Mr. WILSON. I mean all through Southern Classification territory.

Mr. HINDS. That will take in Missouri, will it not?

Mr. SLUSSER. South of the Ohio River and east of the Mississippi.

Mr. HINDS. That I know nothing about. That is out of my latitude.

Mr. WILSON. I do not quite understand the particular necessity for the intervention of these men for the local markets in the Middle West. It is a matter for his explanation, if he wants to say anything more about it.

Mr. SLUSSER. How do you serve your people? How is your business of advantage to the local dealers in making the distribution?

Mr. HINDS. For the simple reason that they buy from hand to mouth. Our local dealers there buy from hand to mouth. Nine out of ten of them will sell a job before they get it. Within a radius of fifty or seventy-five miles, they will telephone in that they want a certain kind of buggy. We have credit sheets from all those manufacturers. If the man has a credit he can have the buggy, and if he has not he cannot get it.

Mr. SLUSSER. How are those goods shipped to you?

Mr. HINDS. They are consigned to us.

Mr. SLUSSER. By the manufacturer?

Mr. HINDS. By the manufacturer.

Mr. SLUSSER. Whose goods are they when they are in transit?

Mr. HINDS. Some of the cars that come belong to the purchaser and some to the manufacturer.

Mr. SLUSSER. Are they consolidated cars?

Mr. HINDS. Consolidated cars.

Recross-examination:

696 Mr. JENNEY. If I understood you correctly, you do not have a carload rate from Des Moines west to the coast?

Mr. HINDS. We have, but we cannot compete with Chicago.

Mr. JENNEY. Then it is a different rate than Chicago?

Mr. HINDS. A higher class rate. We can, in fact, ship back into Chicago and then ship out cheaper than we can ship out of Des Moines.

Mr. JENNEY. Do you get any concessions from the railroad companies?

Mr. HINDS. No, sir.

Mr. JENNEY. None of you?

Mr. HINDS. No, sir.

Mr. JENNEY. Of any name or nature?

Mr. HINDS. No, sir.

Mr. JENNEY. That is all.

H. H. CHAMBERLAIN, a witness of lawful age, called by and on behalf of the intervenors, after being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside and what is your business?

697 Mr. CHAMBERLAIN. I reside in Minneapolis, Minn., and am engaged in the transfer-storage business.

Mr. SLUSSER. Are you interested in the matter of L. C. L. and C. L. rates?

Mr. CHAMBERLAIN. We are very much interested.

Mr. SLUSSER. How, if at all, does the enforcement of 5-b affect your business?

Mr. CHAMBERLAIN. At the present time it does not affect us very much. What we fear is the precedent that will be set by having it approved by the Commission. We can consider it a very dangerous precedent. It would threaten the existence of one very large part of our business.

Mr. SLUSSER. What does your business consist of principally, so far as railroad traffic is concerned?

Mr. CHAMBERLAIN. It consists of the consolidation of carloads of household goods.

Mr. SLUSSER. And for shipment to what territory?

Mr. CHAMBERLAIN. For shipment mostly to the coast, to the western territory, and occasionally to Chicago.

Mr. JENNEY. We shall offer no testimony on this question, and the question is before the Commission.

698 The CHAIRMAN. It is all cumulative.

Mr. SLUSSER. It might be important to show the extent of his business, and how it would affect it if he was prevented. It shows the extent of the interests involved.

The CHAIRMAN. Give us some idea of the extent of your business.

Mr. CHAMBERLAIN. We ship two or three hundred carloads a year of these consolidated cars of household goods. Also we receive a good many cars from the East of new furniture, and other consolidated cars made up of goods from various factories; for instance, from Rockford. The association at Rockford ships us a good many cars.

Mr. SLUSSER. You do not receive much from Official Classification territory?

Mr. CHAMBERLAIN. Not a great deal. We receive quite a good deal; but as regards the way this is going to affect business men in

Minneapolis, we want to say that this was brought up before the Commercial Club in the city of Minneapolis here last Monday, and it was inquired how many of the business men present would 699 be affected by such a rule if it was to be put into effect. There was not a business man in the place, and there were a large number of business men present, that did not declare it to be a most serious menace to his business. For instance, all lines of manufactured furniture; there is a great deal of that done in Minneapolis, and notwithstanding the fact that it brings in this competitive business from outside, yet they considered the right to consolidate car-loads of more value to them, from the fact that they can use it going out, than the protection as against competition from outside would be.

The CHAIRMAN. Do the wholesale grocers and wholesale liquor men want it?

Mr. CHAMBERLAIN. Practically all the business interests were a unit in favor of the present status being continued.

Mr. SLUSSER. The same would apply at St. Paul?

Mr. CHAMBERLAIN. The same would apply practically at St. Paul. I have it in mind that if the matter was brought up the same way in Chicago, or other places, the result would be the same. The business men would rise up en masse against any such encroachment.

700 The CHAIRMAN. How would it be at Stillwater, Minnesota, and Waukesha, Wisconsin?

Mr. CHAMBERLAIN. I think it would be the same with all of them. Nobody seems to be aware of the extent to which this business of consolidating carloads is going on until you begin to inquire into it and stir up the matter; you do not realize what a big matter you are getting hold of.

The CHAIRMAN. You do not realize always who is going to get hurt when there is a change made in a freight rate.

Mr. CHAMBERLAIN. No, sir. I should like to say one or two things about the question of irregularity in rates; that it is a matter which we certainly never have indulged in in our territory, and I think it is more an imaginary danger than anything else. No matter who calls us up and asks for a rate, the rate is just the same to one man as to another.

The CHAIRMAN. How many concerns are there in Minneapolis doing the same kind of business as yourselves?

Mr. CHAMBERLAIN. We only have one very small competitor in that line, and we do not pay any attention to them.

701 The CHAIRMAN. You have a virtual monopoly of this business as matters stand now?

Mr. CHAMBERLAIN. Oh, yes. We have a competitor at St. Paul who is present here, or represented.

The CHAIRMAN. Do you and he make the same rate?

Mr. CHAMBERLAIN. We make the same rates practically anyway regardless of his rate, we always make our rate. We never ask his rate, but I imagine they are substantially the same as ours, or we would hear from people who would get a different rate. I do not

think as a business concern that it would be business policy for us to make a variety of rates to different people. I do not think any well-regulated business would do it.

The CHAIRMAN. You are perfectly free to do it, if you think best.

Mr. CHAMBERLAIN. There is no law to prevent it any more than the law of expediency and necessity. We can not disregard that very well in a business way.

The CHAIRMAN. Is there any further question to be asked Mr. Chamberlain?

Mr. WILSON. None.

Mr. SLUSSER. Do you know Mr. Nye?

702 Mr. CHAMBERLAIN. Yes; secretary of the Commercial Club.

Mr. SLUSSER. Is he one of the parties you have referred to?

Mr. CHAMBERLAIN. Yes; he is what they call the "Commissioner of the public affairs committee."

Mr. SLUSSER (showing witness a letter). Do you know the man to whom this letter is addressed?

Mr. CHAMBERLAIN. I know Mr. Fleming by reputation. I do not know him personally.

Mr. SLUSSER. Is he here?

Mr. CHAMBERLAIN. I tried to get hold of him.

Mr. FLEMING. I am here.

Mr. SLUSSER. Would you care to have this letter read?

Mr. FLEMING. Certainly.

Mr. SLUSSER. I should like to read a letter from the secretary of the Commercial Club, giving his views on the subject.

The CHAIRMAN. Oh, no.

Mr. JENNEY. Do not take up time. We want to get through tonight if we can.

703 Mr. SLUSSER. That is all, then, unless you have some questions to ask.

F. F. HEDDEN, a witness of lawful age, called by and on behalf of the intervenors, after being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside?

Mr. HEDDEN. Los Angeles, California.

Mr. SLUSSER. What is your business?

Mr. HEDDEN. I am president and general manager of the Trans-continental Freight Company and also a director in the Chicago Carloading Company.

Mr. SLUSSER. Are those forwarding companies, so-called?

Mr. HEDDEN. Yes.

Mr. SLUSSER. Where is the principal office of your main company?

Mr. HEDDEN. At Chicago.

Mr. SLUSSER. Have you other offices?

Mr. HEDDEN. Yes.

Mr. SLUSSER. Where?

Mr. HEDDEN. We conduct offices in New York, Philadelphia, Seattle, San Francisco, and Los Angeles.

704 Mr. SLUSSER. Will you state the particular lines of goods that are handled through your company in the way of consolidation of cars and shipments?

Mr. HEDDEN. We confine ourselves almost entirely to household goods, machinery, and new furniture. Our first line of goods was entirely household goods. We never handled anything else until a few years ago, when we took up the consolidating and forwarding of machinery and new furniture.

Mr. SLUSSER. Will you state to the Commission whether the enforcement of Rule 5-b or the note to Rule 5-b affects your business?

Mr. HEDDEN. It does to a certain extent.

Mr. SLUSSER. In what way?

Mr. HEDDEN. It prohibits our consolidating household goods from New York and Philadelphia to Chicago, there to be distributed and reconsigned. Prior to this rule going into effect we did that. Our New York office would accumulate the 12,000 pounds necessary and ship it into Chicago at the carload rate. Now we cannot do that, but must now ship at the less than carload rate and take chances on its being smashed up, etc.

705 Mr. SLUSSER. How does that affect your business, as to injuring it or not?

Mr. HEDDEN. My testimony would have to be the same as all the rest, that it is much more liable to damage.

The CHAIRMAN. How much has your business been affected by this?

Mr. HEDDEN. Oh, to the extent of, I should say, twenty carloads a year from New York. Now, from Grand Rapids to Chicago, in the new furniture, it would go a good deal more than that—a great deal more than that. We formerly—

The CHAIRMAN. That situation has been described to us. I do not think it is necessary to go over it again.

Mr. HEDDEN. We are hit the same as the others from Grand Rapids.

The CHAIRMAN. Your situation would be exactly the same?

Mr. HEDDEN. Yes. From Grand Rapids to Chicago we can not now consolidate over the railroads, but we do by electric road and by lines connecting get the goods to Chicago at the carload rate, from Grand Rapids. We are doing that business to-day.

706 The CHAIRMAN. Anything further you wish to add?

Mr. SLUSSER. State any fact you wish that is not cumulative, has not been gone over and testified to by others in the same line.

Mr. HEDDEN. I have a few figures, if you will pardon me, that should like to show for your special benefit, because you have asked some of the others and they have not seemed to be able to tell you. For instance, the shippers of furniture for whom our Chicago Consolidating Company have loaded in the last few months, the total number

ber of shippers is 307. Out of those 307, 80 of them are in Chicago, and the other 227 shipped locally into Chicago. Now, I can give you a list of those.

The CHAIRMAN. I do not care about that.

Mr. HEDDEN. And the places.

The CHAIRMAN. No.

Mr. HEDDEN. They come from all over the East, from west of New York City and Brooklyn.

The CHAIRMAN. Under existing rules the less than carload rate must be paid up to Chicago?

Mr. HEDDEN. Yes.

707 Mr. SLUSSER. What he is trying to bring out, I think, is the territory which is covered, showing that the people living in the isolated places are able to get consolidated rates by shipping them into Chicago, and then having them go out from there—

The CHAIRMAN. Of course.

Mr. HEDDEN. In that way they get their goods to the coast.

Mr. SLUSSER. Go on with the next proposition.

Mr. HEDDEN. The other is machinery. We have 145 different concerns, 44 of them in Chicago and 101 outside of Chicago.

Mr. SLUSSER. Distributed over what territory?

Mr. HEDDEN. All over the East.

The CHAIRMAN. How far east?

Mr. HEDDEN. Columbus, Ohio; Big Rapids, Michigan; Cleveland, Ohio; Milwaukee, Wisconsin; Rockford, Illinois; Defiance, Ohio.

The CHAIRMAN. Anything east of Ohio?

Mr. HEDDEN. Yes; as far east as Brooklyn, N. Y. I notice some shipments going out of Brooklyn here.

Mr. SLUSSER. Is there anything else?

708 Mr. HEDDEN. There was another question I should like to give figures on, and that is the question of claims. As we have presented them to the railroad companies, on a matter of westbound cars, including household goods and machinery, on the last 529 cars that we have shipped, our claims against the railroad companies have averaged 86 cents a car.

Mr. SLUSSER. For shipments to what points?

Mr. HEDDEN. To the West. All of our shipments are for the far West.

On new furniture, which only extends over a matter of five months, 214 cars, the claims have been \$1.10, and on eastbound business, which is practically all household goods, a matter of 93 cars, \$1.90 a car. On the total 836 cars the average is \$1.03 a car. Those are the claims as presented by ourselves, but not the claims as paid by the railroad companies. I do not think they would average 25 cents a car.

The CHAIRMAN. Does anyone desire to interrogate Mr. Hedden?

Mr. JENNEY. No.

The CHAIRMAN. That seems to be all. How many more witnesses have you?

709 MR. SLUSSER. Are there any other gentlemen here who are interested in the matter of the application of this rule, who desire to testify? There are none here that I know.

The CHAIRMAN. Mr. Wilson and Mr. Jenney, do you desire to call more witnesses?

Mr. JENNEY. I want simply to show the through-car service that we have for L. C. L shipments. It will take about five minutes—over the Wabash and Nickel Plate.

The CHAIRMAN. The only question is whether we should try to finish to-night.

Mr. SLUSSER. There is one other man here who would like to be heard briefly.

C. C. STETSON, a witness of lawful age, called by and on behalf of the intervenors, after being first duly sworn, testified as follows:

Mr. SLUSSER. Where do you reside?

Mr. STETSON. St. Paul, Minn.

Mr. SLUSSER. What is your business?

Mr. STETSON. I am manager and president of the Fidelity Storage and Transfer Company.

710 Mr. SLUSSER. Is this company engaged in consolidating cars and forwarding to points of destination?

Mr. STETSON. Yes.

Mr. SLUSSER. Will you kindly state to the Commission how the enforcement of the note to Rule 5-b affects your business?

Mr. STETSON. Only at present in preventing our consolidating cars for shipment in the eastern section of the country, but we are reasonably confident that if it is approved by the Interstate Commerce Commission it will be adopted by the western railroads, and cut us off and our customers from receiving the benefit of the assembling and shipping of carloads to the Pacific coast points. The latter is at present our line of business, being confined practically to the shipment of household goods.

The CHAIRMAN. Your situation is practically the same then as Mr. Chamberlain's?

Mr. STETSON. Almost the same.

The CHAIRMAN. You have had no appreciable effect from the application of the note to Rule 5-b in Official Classification territory,

but you are apprehensive that if that rule should not be con-

711 demned by the Commission, that it might be adopted by the western lines, in which case you would be very seriously injured in your business?

Mr. STETSON. Yes, sir; and we furthermore believe it would be a great hardship upon the public. I do not know that the merits and virtues of the forwarding companies, as they should be looked at in a broad way, from the point of the interest of the general public at large, has been brought out. I thoroughly believe that they are

blessing, that they save not only a substantial amount in transportation expense to the customers, but that they save freight largely in the damage. They present a responsible, competent representative to load, with proper and fully equipped connections, to unload and deliver. They furthermore are equipped to attend to the forwarding beyond the terminal point to which carloads are ever directed as carloads, by having their distributing connections through, with full instructions to properly reconsign and reship, a duty which we feel the railroads could not ever properly perform.

Mr. SLUSSER. You think then that they stimulate trade and interstate commerce?

Mr. STETSON. Oh, yes; decidedly.

712 Another point: If it were not for the forwarding agents, it would be fair to say that ninety-nine out of one hundred, of every one hundred individuals and families who ship their goods from our city, and I presume from Chicago and others, would have to pay a larger rate, would have to receive their goods in a mutilated condition, and would have probably to be put to great inconvenience, if not entirely unprotected, in the matter of securing any redress against the railroads, because of their poor knowledge as to submitting and prosecuting a claim. We have no less an authority than Mr. Calkins, the president of the Freight Claim Agents' Association, the national organization of freight-claim agents, to the effect that the claims presented for damage to household effects, to the railroads of the United States, are more than twice their total revenue.

The CHAIRMAN. What is that—that the claims presented are double the gross receipts of the railroads?

Mr. STETSON. The gross receipts of the railroads.

The CHAIRMAN. Who makes any such statement as that?

Mr. STETSON. Mr. Calkins stated that at a meeting of the warehousemen at Saratoga in 1896.

713 Mr. JENNEY. I guess you must have misunderstood him.

The CHAIRMAN. Gross receipts on all classes of traffic?

Mr. STETSON. On household goods. If your honor would like, I will quote this. It is an address to the warehousemen's convention at Saratoga, in which the secretary of the association is interrogating him. Mr. Calkins said.

"Gentlemen, I could not tell you how many thousands of household goods claims we receive each year or how many thousands of dollars we pay out. I will venture the statement that we do not receive fifty per cent in earnings of what we pay out for loss and damages to household goods. Any railroad in the country would be far better off if they did not have to handle household goods."

And again he said:

"I have the honor of being president of the Freight Claim Agents' Association, a national organization of freight-claim agents, who make certain rules for the adjustment of claims, but have to keep

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714 within certain bounds. They can not make rules which will interfere with traffic arrangements or in any way injure the traffic of any member road."

Mr. SLUSSER. Has it been your experience that where household goods are shipped in carload lots large claims are made against the railroads on an average?

Mr. STETSON. Positively, no. There have been occasional small claims, but they are infinitesimal.

Mr. SLUSSER. Have you an opinion, based upon your experience, as to how the forwarding agents' business affects the railroads?

Mr. JENNEY. It does not seem to me we ought to take up our few remaining minutes in this testimony.

Mr. SLUSSER. You people seem thus far to have been directing your particular line of attack against the forwarding agents. I want to see how their business with the railroads is affected in the West, where forwarding agents are recognized.

Mr. JENNEY. I do not see how it is very material.

The CHAIRMAN. What is the point of the question?

715 Mr. JENNEY. Do you want to show that we ought to welcome this increase of our revenue?

Mr. SLUSSER. I do not, but I think a casual reading of the Official Classification will show that the rules which you have adopted here are made against the business of the forwarding agents, and that they are put in the Official Classification for that purpose and practically for that purpose only.

Mr. JENNEY. This was put in at the suggestion of the Commission that that was the way to take care of it. They told us to do it in that way.

Mr. SLUSSER. In the Buckeye buggy case they did not do that. They told you to modify your classification so as to permit the goods to be shipped at carload rates when they were under one ownership in transit.

The CHAIRMAN. Let us postpone the argument to a later date. Is there anything further you want to ask of Mr. Stetson?

Mr. SLUSSER. I should like to have him state whether he thinks the business of forwarding agents aids the railroads or is a benefit to them or a loss.

The CHAIRMAN. That is assuming that he is more competent to pass an opinion upon their business than they are themselves. I think there is a good deal in the proposition.

716 Mr. SLUSSER. The western railroads are not here complaining.

The CHAIRMAN. That would not be very profitable.

Mr. STETSON. If your honor will allow me, I should like to add to the list of things that the forwarding agent accomplishes, proper care of the goods at destination, and the insurance of the goods in transit if the owner desires. That is seldom done; perhaps it is not often known that it can be done by the casual shipper.

The CHAIRMAN. Is this privilege of combining L. C. L. shipments by the consignors in Western Classification territory limited to certain specified articles, or may any combination be made?

Mr. STETSON. I think it is not at all limited, but I have not had any occasion to know.

Mr. CHAMBERLAIN. If your honor will allow me for a moment, I am familiar with the tariffs. The classification makes no distinction at all on the matter of ownership. It is left out of the question entirely. The Western Classification does not permit the putting of different classes into the same car, as they do in the East. The business is handled on a different basis.

717 The CHAIRMAN. I understand the roads in Official Classification territory extend a privilege, apparently of great value, which is denied by the western roads.

Mr. SLUSSER. I have here the Western Classification. Perhaps it would be competent to introduce it in evidence.

The CHAIRMAN. That will be understood as in evidence.

Mr. STETSON. Do you mean western roads or eastern roads?

The CHAIRMAN. Granted by eastern roads which is denied by the western roads. Am I not right that in Official Classification territory the owner of any number of articles taking the same rate may combine them in a carload lot and get the carload rate?

Mr. JENNEY. He can combine different classes and rates—combine anything.

The CHAIRMAN. Then the highest rate on any of the articles put into the car would prevail?

718 Mr. STETSON. Yes. If he combined articles taking different rates, he would have to pay the highest rate on any one shipment. That is not permitted in the Western Classification nor in the Southern.

Mr. SLUSSER. That is, if under one ownership, and that owner is the consignor or consignee?

The CHAIRMAN. Yes.

Mr. CHAMBERLAIN. Freight rate classifications are sometimes much broader than less than carload classifications in the same territory.

The CHAIRMAN. When I asked my last question I supposed that was the case, but I have noticed that all the gentlemen who came here have apparently been handling furniture, new or second-hand, and machinery.

Mr. JENNEY. That is all.

Mr. SLUSSER. No; the Liquid Carbonic Company and the Otis Elevator Company.

The CHAIRMAN. That is machinery, mostly.

Mr. SLUSSER. A carbonator is not machinery.

Mr. JENNEY. He said it was nothing but machinery.

Mr. STETSON. We have loaded a few carloads of liquor from Kentucky points, as well as some other things.

719 The CHAIRMAN. My suggestion is that all the men who have come here are mainly interested in two or three articles. If

this field is open, I wonder that there is not somebody here who is interested in different lines of traffic.

Mr. SLUSSER. Buggies and other things in the manufacturing line, of course.

Mr. STETSON. Mr. Post, who has testified, has a large equipment and handles nearly everything in the catalogue.

The CHAIRMAN. He is a transfer agent as well.

Mr. STETSON. But he ships transcontinentally.

The CHAIRMAN. Is there any further question to be asked of Mr. Stetson, or any further explanation you desire to make, Mr. Stetson? If not, we will excuse you.

Mr. SLUSSER. I am advised by Mr. Post that it may be conceded that the California wine producers ship consolidated cars, and are permitted to ship into the Official Classification territory, although they are consolidated cars.

Mr. JENNEY. They must be shipped by one man as the owner then.

720 Mr. SLUSSER. As an agent for the owner. They ship as forwarding agent, like these other concerns, like the Fruit Growers' Agency. If there is any gentleman here who represents any interests who desires to testify, I think the Commission will hear him. I know of no others.

The CHAIRMAN. Well, Mr. Jenney——

Mr. JENNEY. If the Commission please, in view of the testimony which has been introduced here, I desire to suggest that the Commission take the testimony of one or two witnesses as to what these defendants themselves have done in the way of taking care of the demand for L. C. L. business. I can prepare a statement and send it to my friend, or I can take the testimony.

The CHAIRMAN. Oh, call your witness.

B. D. CALDWELL, a witness previously sworn, being recalled, testified as follows:

The CHAIRMAN. You have already been sworn?

Mr. CALDWELL. Yes.

721 Mr. JENNEY. Will you please tell us what the Lackawanna and its connections, the Nickel Plate and the Wabash, these three defendants here have done? State the service which is performed over those roads, for less than carload shippers, in the way of fast express service and through cars.

Mr. CALDWELL. Our company has a very complete system whereby we run through cars with L. C. L. traffic from New York to our other eastern territory, by way of our connections west of the Niagara frontier, including the Nickel Plate, the Wabash, the Grand Trunk, the Lake Shore, and the Michigan Central, and to a limited extent via the Pere Marquette.

We load through cars from our New York piers daily with L. C. L. traffic that is brought to those piers, to most intermediate points of any

on our own road, including Buffalo, and to most of the large centers west of there in the central freight territory, including Cleveland, Detroit, Cincinnati, St. Louis, and Chicago. We likewise run through cars to St. Paul and Minneapolis. We run similar through cars to Chicago, which are delivered at the transfer platforms of the western roads and are transferred by them to through cars which they make up daily to a large number of western points.

22 In addition to these through cars from our New York piers we handle similar traffic from all the outlying stations in New York Harbor, including a great many principal stations in Brooklyn, which are taken on Annex floats in cars to our trains at Hoboken, which is our Jersey terminal and where the trains start.

We also load similar cars at transfer stations at intermediate points on our road, the traffic for which is loaded in daily cars from various points to those transfer stations, and loaded into similar through cars to western points.

We have transfer stations at points like Scranton, where cars come to us from connecting roads and are similarly loaded in through cars to western points; likewise at Binghamton, which includes a large amount of such traffic from New England territory. Our Port Morris transfer station takes care of such traffic from the New England territory covered by the New Haven road.

Mr. JENNEY. These through cars that you say handle this L. C. L. freight that you talked about are westbound cars. Have you the same service eastbound?

23 Mr. CALDWELL. Our connections have similar service on L. C. L. traffic eastbound, coming to us in through cars. There is not as large a proportion of the eastbound, by virtue of the fact that L. C. L. business eastbound is not nearly so large in proportion as westbound.

Mr. JENNEY. What time, from the delivery of L. C. L. freight at one of your New York piers, will it take you to carry that freight, for instance, to Chicago?

Mr. CALDWELL. The time is sixty hours from New York to Chicago and St. Louis, and is made with substantial regularity. We have been running, or did run up until the earthquake in California, a through car to San Francisco, which made an average time of about fourteen or fifteen days.

Mr. JENNEY. And that freight takes sixty hours to move to Chicago and St. Louis. How frequently are the through cars made up which that freight will be assembled?

Mr. CALDWELL. Daily. The traffic is delivered to our stations and loaded into through cars the same day, and is delivered early the next morning, or sixty hours, at Chicago and St. Louis.

Mr. JENNEY. How does that compare with the through car movement of freight of a lower class in time? Is it faster or slower?

24 Mr. CALDWELL. It is much faster than the average movement of carload traffic, the bulk of which is of a lower class,

such as coffee, sugar, etc., the average time of which to Chicago and St. Louis is, I should say, about five days.

Mr. JENNEY. Now, Mr. Caldwell, take it on the lines of the Lackawanna, the Wabash, and the Nickel Plate, is there any movement of L. C. L. freight long distances over those lines, unless it be in an exceptional case, that does not go in through cars?

Mr. CALDWELL. Substantially none, because these through cars contemplate the taking care of all such traffic.

Mr. JENNEY. That is all.

Cross-examination:

Mr. SLUSSER. You are speaking of your road only, are you not?

Mr. JENNEY. Just one other question. As I understand it, Mr. Caldwell, about half the westbound freight on our road is L. C. L.?

Mr. CALDWELL. I should say half or greater.

Mr. JENNEY. Half or more?

725 Mr. CALDWELL. Yes.

Mr. JENNEY. And eastbound about what per cent?

Mr. CALDWELL. I could not say accurately, but it is very much less. The great bulk of the eastbound business is carload traffic—grain, flour, etc.

Mr. SLUSSER. You are speaking for your own road only, are you not?

Mr. CALDWELL. Well, I am speaking for our own road only, but I know that the same conditions prevail with respect to all the New York trunk lines on westbound traffic.

Mr. SLUSSER. Do you speak from personal knowledge or from hearsay?

Mr. CALDWELL. From personal knowledge. It is a long established practice.

Mr. SLUSSER. Your road is considered one of the best equipped roads for the handling of L. C. L. freight in the world, isn't it?

Mr. CALDWELL. It is very kind of you to give me the opportunity to say yes.

The CHAIRMAN. If you insist upon it, Judge, he will not dispute it.

726 Mr. CALDWELL. I am afraid the judge wants to estop any further adverse testimony from me, Mr. Chairman.

Mr. SLUSSER. I want to keep your good will, if that is possible. You say you ship cars daily, L. C. L. shipments in carload lots, giving carload movement, as I understand it?

Mr. CALDWELL. Yes.

Mr. SLUSSER. From what stations?

Mr. CALDWELL. I have already stated—from our New York piers.

Mr. SLUSSER. You do not specify what stations you make daily shipments from.

Mr. CALDWELL. I said from all our New York piers, and similar arrangements from our outlying stations.

Mr. SLUSSER. No; you do not understand me. I want to know whether you make daily shipments from all these various stations, or do you intend to make daily shipments from all?

Mr. CALDWELL. Daily cars are run from all these stations of which speak.

Mr. SLUSSER. From the way stations as well?

Mr. CALDWELL. I said from way stations there are daily cars run to the transfer platforms, which are loaded daily into similar through cars to western destinations.

Mr. SLUSSER. Those are mixed cars that take up the goods way stations, are they not?

Mr. CALDWELL. Not necessarily. Cars stop and pick up at various stations. We run through cars from many single stations to the transfer station.

Mr. SLUSSER. I am speaking now of the freight that is shipped from the way stations along your line, the smaller stations. Those are picked up by the way freights, are they not?

Mr. CALDWELL. In some cases they are, where the amount of the business is spasmodic; but from any station which is a producing station sufficient to produce a reasonable amount of less than carload traffic, daily local cars are run from those stations to the transfer stations.

Mr. SLUSSER. How is the freight handled through your warehouses?

Mr. CALDWELL. It is loaded through our warehouses into the cars, on floats which lie alongside the freight house doors.

28 Mr. SLUSSER. And the commodities are delivered to the warehouses of the owners, are they?

Mr. CALDWELL. They are delivered to the owners, trucked as close as possible to the proximity of the opening in the warehouse from which the car is loaded.

Mr. SLUSSER. Take, for example, a shipment from Cincinnati to Buffalo. Suppose there were ten L. C. L. shipments assembled there, and you were able to put nine of them in a car for Buffalo, but not the tenth. Would not the tenth shipment go out in some car that was delivered to the nearest junction point to Buffalo, and there be transferred into another car and so carried to Buffalo?

Mr. CALDWELL. You are speaking now about the eastbound?

Mr. SLUSSER. Yes; I am speaking about that as an example.

Mr. CALDWELL. I am not as accurately informed about that as on the business originating on our own road, but I do know, too, that in a case of that kind, where there might be a single shipment which failed to go in a car loaded from Cincinnati to Buffalo, it would be routed to Buffalo, and if it was destined to New York 29 it would be loaded into a through car which we load daily from Buffalo to New York, to certain piers in New York.

Mr. SLUSSER. I was speaking of ten shipments from Cincinnati to Buffalo. Those that you are able to put into one car go through on through car service?

Mr. CALDWELL. Pardon me; I have no interest for our company from Cincinnati to Buffalo. Our company does not extend west of Buffalo.

Mr. SLUSSER. Take a shipment from some other smaller station, some station from which you do make, however, a through car service.

Mr. CALDWELL. Perhaps I can give you the information you want by saying, for instance, take Elmira, on our road.

Mr. SLUSSER. Yes.

Mr. CALDWELL. We load through cars from Elmira to western points. If there should be a shipment for a western destination to which we do not load a through car from Elmira, that would be loaded in a car from Elmira to the nearest transfer station, and would be re-loaded there into a car going to the point of destination.

730 Mr. SLUSSER. Where it was at a local station, it would be handled by the train screws, would it not?

Mr. CALDWELL. There is very little of this westbound L. C. L. traffic that originates at small stations, and picked up by the next train. There is of course some.

Mr. SLUSSER. The terminal freight stations in New York are congested, are they not; have been for the last year or two?

Mr. CALDWELL. At times, when there is an extraordinary rush of business.

Mr. SLUSSER. Now, take it at such times; would it not be an advantage if the various concerns or shipments were delivered at one time, say fifty shipments assembled by a forwarding agent at one time, rather than to have them come in from various owners at various times through a period of several days? Would it not be an advantage to the railroad to have it delivered at one time and put in the cars in that way?

Mr. CALDWELL. If all shipments could be so handled and come at one time, it would of course simplify the situation.

731 Mr. SLUSSER. And relieve the congestion?

Mr. CALDWELL. But it is beyond a possibility that all or any large proportion could come. Hence any small proportion that might come through the agency of one or two or three forwarding agents would not simplify the situation.

Mr. SLUSSER. But it would tend to relieve it to the extent that those shipments were delivered at one time, at one forwarding station, to be loaded into a car at one time? That would tend to relieve the congested situation, would it not?

Mr. CALDWELL. I think possibly so, slightly but not materially, on the testimony that has been brought out here as to the business handled.

Mr. SLUSSER. It would depend upon the extent to which that was practiced.

Mr. CALDWELL. I have already stated, if all were delivered at one time, it would probably simplify the matter; and yet they could not all be accommodated, and the teams that would bring them at one time could not be accommodated, and the city streets would prob-

732 ably be congested by the teams waiting to deliver to the warehouse.

Mr. SLUSSER. Would it simplify it some if it was not delivered to the warehouse at all, but if the forwarding agents were permitted to assemble it in their own warehouses, and have a side track, where they could load it into cars?

Mr. CALDWELL. We have not a single side track delivery in New York City; therefore that is impossible.

Mr. SLUSSER. That is within the city itself?

Mr. CALDWELL. In the city of New York proper we have not a single side track delivery. It must all be delivered through our teams.

Mr. SLUSSER. You mean that deliveries cannot be made in that way; that it is impossible to have side tracks established under the existing conditions?

Mr. CALDWELL. The opportunity does not exist.

Mr. SLUSSER. May I inquire, Mr. Caldwell, what time it takes for a carload shipment of freight to go from New York City to Chicago on an average?

Mr. CALDWELL. If it is high-class traffic, subject to being moved on our fast merchandise trains, upon which these L. C. L. 733 movements are made, in through cars, it would make the same time as the L. C. L. If it was lower class traffic, which constitutes the larger part of the carload traffic, it would move on slower trains; and as I have already testified, would mean a five-day movement to Chicago as compared with a sixty-hour movement.

Mr. SLUSSER. Do you undertake to state, Mr. Caldwell, that any considerable proportion of freight goes from New York City to Chicago in any kind of a movement in sixty hours?

Mr. CALDWELL. I have already said that we make a schedule on all our L. C. L. traffic from New York to Chicago and St. Louis of sixty hours, and it is substantially made all the time, barring weather conditions.

Mr. SLUSSER. That is, the schedule is made all the time; but do the cars go through on time? Is it not a fact that it takes a great deal longer than sixty hours?

Mr. CALDWELL. Can I make myself any clearer by saying that the record shows that there is a substantial delivery of these cars and these trains within sixty hours, barring accidents or weather conditions? That is how we have obtained our record. I am speaking of the results in these matters.

734 Mr. SLUSSER. When you say it is delivered at Chicago in sixty hours, you do not mean it is delivered at the freight house, for delivery to the customer, but it is delivered in the outer yard. That is what you mean to say, isn't it?

Mr. CALDWELL. Take, for instance, the Nickel Plate Company, which Mr. Webster can confirm. The trains are delivered in their yards in the early morning, and delivered to their freight houses at

an early business hour, ready for the teams of the merchants to whom the business is destined to get them unloaded and delivered.

Mr. SLUSSER. You are speaking from personal knowledge now?

Mr. CALDWELL. Absolutely. Pardon me, I do not wish to be understood as saying that there may not be some congested conditions in a yard or freight house, where there might be delay, but that is the practice and the general rule.

Mr. SLUSSER. Don't you know that it is common that L. C. L. shipments are delayed in the yard for from one to three days; that that is the common experience of merchants who receive goods from the East by L. C. L. shipments?

735 Mr. CALDWELL. It is not so with the business which we handle, and which I have been describing. It is not the general rule at all.

Mr. SLUSSER. You do not know anything about the shipments west of Chicago, do you—the L. C. L. shipments in that territory?

Mr. CALDWELL. I do not know with sufficient knowledge to give definite testimony. It is my understanding that the western roads have largely in effect the same practice that we have of loading cars daily from their stations to western destinations.

Mr. SLUSSER. Your experience seems to be at variance with that of the actual shipper. I think that is all.

Mr. JENNEY. That is all I care to show.

Mr. SLUSSER. I want to ask Mr. Caldwell one more question that occurs to me now and that I did not ask him. In the case of a shipment of L. C. L. freight from New York City to Chicago under through-car service and under the conditions that you have stated

736 do the railroads perform any more or greater physical service in the handling of that car and the sending it forward than they would perform in shipping a carload, a C. L. shipment? If so, what?

Mr. CALDWELL. We are speaking of carload traffic, of high class.

Mr. SLUSSER. Yes; I am speaking of that.

Mr. CALDWELL. Which goes forward on the same trains. The service so far as the physical handling en route is concerned is the same. There is a materially increased service performed by our company however, with respect to the L. C. L., in that we do load it into cars and it is unloaded at the other end, whereas the general rule is that the carload traffic shall be loaded by the shipper. The latter is not always observed at all our stations. In New York, by virtue of the fact that there are sometimes physical conditions with respect to the loading from the warehouse into the float of a carload point, which it would be impracticable for the shipper to do; but that is the general rule.

Mr. SLUSSER. Will you state the difference in rates between a L. C. L. shipment by carload from New York to Chicago and a C. L. shipment of the same kind of freight from New York to Chicago? What is the difference in the rate?

Mr. CALDWELL. Do you mean the rate per hundred or do you mean the rate per car?

Mr. SLUSSER. The rate per hundred.

Mr. CALDWELL. It varies according to the traffic.

Mr. SLUSSER. I now have in mind the shipping of a carload. I ask you about the shipment of a carload of a given kind of freight.

Mr. CALDWELL. Will you specify the kind of freight you have in mind, and I will try to answer you?

Mr. SLUSSER. What is the highest grade freight you ship?

Mr. CALDWELL. Dry goods, silks, and so on.

Mr. SLUSSER. Very well, take dry goods and silks.

Mr. CALDWELL. There are no carload rates thereon.

Mr. SLUSSER. Take something on which there are carload rates—tea.

Mr. CALDWELL. I don't know that there are carload rates on tea.

Mr. SLUSSER. Do you have carload rates on furniture?

Mr. CALDWELL. Yes.

738 Mr. SLUSSER. Take furniture, take an assembled car where there is a diversity of ownership, and it is shipped as you say, through from New York City to Chicago L. C. L.—what is the difference in rate between the shipment of that car and the C. L. rate on a car of the same kind of furniture and the same kind of goods, the ownership being in one person?

Mr. CALDWELL. I don't remember exactly just what the L. C. L. rate is. My recollection is that there is not a great difference—

The CHAIRMAN. I do not wish to be captious, but you are keeping twenty-five gentlemen waiting here to answer a question which anybody can answer by turning to a tariff.

Mr. SLUSSER. I want to find out, if I can, by this witness whether the difference in rate is intended to measure the difference in service which the railroad company renders.

Mr. JENNEY. That is another question and one we have not got up here.

739 The CHAIRMAN. It is another question. You can look at any tariff and see what the rates are on any article, carload and less than carload.

Mr. SLUSSER. I wanted that for a basis for the next question. Will you kindly state whether the difference between the L. C. L. rate and the carload rate is intended to measure the difference in the service rendered by the railroad companies?

Mr. CALDWELL. That is a big question, but the difference between less than carloads and carload rates is based upon all of the conditions that enter into the handling of the one as compared with the other, and it is generally admitted, I think, that the handling of L. C. L. business involves a very much greater expense to the railroad companies than the handling of carload business, and naturally they are entitled to a very much larger compensation for it, of which they should not be deprived, in handling L. C. L. business, by being forced to carry it at carload rates against their will.

Mr. SLUSSER. If it costs them no more money, it is no disadvantage to deprive them of that excess rate, because it costs them no more money to handle the traffic.

Mr. CALDWELL. But they have got to handle it anyhow, as I have testified.

740 Mr. SLUSSER. You have said that the C. L. business is done by the shipper.

Mr. WILSON. The fixed charges on the plants which are necessary for the handling of L. C. L. business are the same whether you handle one carload or ten carloads of L. C. L. business from a given point.

Mr. CALDWELL. It would take time to enter into the details of the difference in the business, which I will go into, if you wish.

Mr. SLUSSER. I do not think I wish to ask you to go into any greater detail.

Mr. WILSON. You have got to pay the same clerk fifty dollars a month whether he bills five L. C. L. shipments or a hundred.

Mr. CALDWELL. The carload traffic is loaded by the shipper on the team track, where L. C. L. traffic is handled through the freight house, which may cost a million dollars in New York City. There may be a hundred thousand dollars a year rental paid for freight houses in which to handle that traffic. There are all sorts of conditions entering into it.

741 Mr. SLUSSER. The point you are making is that it costs the railroads more to handle L. C. L. business than it does C. L.

Mr. CALDWELL. For that reason their rates are higher, and for that reason they object to being forced to carry the L. C. L. traffic against their will at carload rates.

Mr. SLUSSER. But if it is handled as C. L. business by the forwarder, then the railroad company does not handle it as L. C. L. business?

Mr. CALDWELL. Yes; they do. The forwarder merely consolidates it in a warehouse somewhere. That does not prevent the railroad people in New York City at our piers handling it. We have got to handle it. The forwarder does not handle it at our pier.

Mr. SLUSSER. The forwarder puts it on the cars, doesn't he?

Mr. CALDWELL. No; he does not, as a rule, at New York City.

Mr. SLUSSER. He does at all other points.

Mr. CALDWELL. He may, where there are team tracks.

Mr. SLUSSER. I must say that I do not know how they do it in New York City.

742 Mr. CALDWELL. When you are down there I will be glad to show you the difficulties under which we labor there.

T. W. GALLEHER, a witness previously sworn, being recalled, testified as follows:

Mr. WILSON. You are the general freight agent of the Baltimore & Ohio Railroad?

Mr. GALLEHER. Yes.

Mr. WILSON. You have been sworn?

Mr. GALLEHER. Yes.

Mr. WILSON. I only want to ask you one question at this late hour, and I will ask you to answer it very briefly, and that is to describe or state the facilities furnished by the Baltimore & Ohio Railroad, of which you are the general freight agent, in the way of through cars for handling L. C. L. business.

Mr. GALLEHER. The Baltimore & Ohio has two stations on North River at which their cars are made up embracing less than carload shipments destined to the principal receiving points in the West as far as Chicago and St. Louis, the intermediate points being Baltimore, Cumberland, Wheeling, Pittsburg, Cleveland, Cincinnati, Columbia, Louisville, and those cars are made daily, containing all less than carload freight.

Mr. WILSON. And how prompt a movement do you give between New York and Chicago, say, for instance?

Mr. GALLEHER. The schedule is sixty hours to Chicago and St. Louis; proportionately shorter, of course, to intermediate points.

Mr. WILSON. How well is that schedule maintained?

Mr. GALLEHER. It is maintained almost invariably. That is, the third morning delivery is made in Chicago and the third forenoon in St. Louis.

Mr. WILSON. Is there any transfer in that L. C. L. business between New York and Chicago after it is loaded in the car from New York?

Mr. GALLEHER. Not from those piers; no, sir.

Mr. WILSON. Are similar through cars containing L. C. L. freight loaded at Philadelphia and Baltimore?

Mr. GALLEHER. They are.

Mr. WILSON. Going west daily on B. & O. train No. 97?

Mr. GALLEHER. Yes.

744 Mr. WILSON. And is there a similar movement eastbound of high-class L. C. L. merchandise, in less volume, however, coming east on train 94 daily?

Mr. GALLEHER. There is.

Mr. WILSON. Making the same schedule?

Mr. GALLEHER. 94 from Chicago and No. 98 from St. Louis.

Mr. WILSON. So am I correct in saying that between all the principal points reached by the Baltimore and Ohio Railroad there is an L. C. L. service in through cars which involves a rapid schedule and no transfer?

Mr. GALLEHER. That is true; not only of the principal points—not only are there through cars to the principal points—but to local territory between the principal points there are, from New York, Philadelphia, and Baltimore, merchandise cars made up which would embrace the territory of a local freight run, those cars being routed in station order for easy delivery by the train crew; or there may be through cars loaded to transfer points like Brunswick, Md., or 745 New Castle, Pa., or Chicago Junction, Ohio, or Cincinnati, and

local cars made from those transfer points to the local territory just beyond.

Mr. WILSON. Is this L. C. L. business which you have described important in revenue?

Mr. GALLEHER. It is.

Mr. SLUSSER. I do not see the purpose of this, your honor.

The CHAIRMAN. It is to show that they can not afford to reduce their revenue on this traffic.

Mr. SLUSSER. It costs them more money.

Mr. WILSON. We will have to keep up our L. C. L. plants and at the same time lose some of our L. C. L. revenue on your proposition.

Cross-examination:

Mr. SLUSSER. This L. C. L. business shipped from New York and other principal points is high-class freight and goes through in this quick time?

Mr. GALLEHER. Some of it is high class and some of it is of lower classes.

Mr. SLUSSER. The lower class freight does not go through so rapidly?

Mr. GALLEHER. Less than carload shipments of a low class 746 freight go through just the same as the less than carload shipments of a high class if they are taken to these piers from which these through cars are loaded.

Mr. SLUSSER. L. C. L. shipments are all loaded from your warehouses by your employees and loaded by them, are they not?

Mr. GALLEHER. That is the rule; yes.

Mr. SLUSSER. How about the C. L. shipments? Are they loaded by your people?

Mr. GALLEHER. At New York and Philadelphia they are loaded by the railroad company, at the pier station.

Mr. SLUSSER. It costs just as much to load a C. L. shipment by your company for shipment to Chicago as it does an L. C. L. shipment doesn't it?

Mr. GALLEHER. That will depend on the character of the freight.

Mr. SLUSSER. Suppose it was a given kind of freight. Would it not cost just as much?

Mr. GALLEHER. Probably; yes.

Mr. SLUSSER. If it was all delivered in small lots by the various consignees to your warehouse and loaded by you on the car, 747 the L. C. L. shipment would not cost any more to handle, your service would not be any greater than it would be on a C. L. shipment, where ownership and consignor were all merged in one person? It would go through your warehouse in the same way in New York?

Mr. GALLEHER. It would cost us more to handle consolidated shipments from two or more shippers than a carload, for the reason that we would have the extra billing and would have to give the extra receipts.

748 Mr. SLUSSER. If there were several bills of lading it would cost you a little more, but if there were but two bills of lading it would not cost you appreciably more than if there was only one bill of lading, and going from one consignor to one consignee?

Mr. GALLEHER. I could not tell what the difference would be. There would be a difference.

Mr. SLUSSER. There would be a material increase in price, would there not?

Mr. GALLEHER. Necessarily so.

Mr. SLUSSER. But yet, so far as the handling of that carload of freight is concerned, the L. C. L. would be just exactly the same as the C. L.

Mr. GALLEHER. At New York, with the exception of the difference in the receipts and the billing.

Mr. SLUSSER. Receipts and billing. Now, how would it be at the other end—at Chicago? Is a C. L. shipment unloaded by your people? Is not that the rule—that the railroad companies unload a C. L. shipment?

Mr. GALLEHER. Not usually; no, sir.

Mr. SLUSSER. Is not that the common practice of other railroads?

749 Mr. GALLEHER. No, sir; it is not the common practice. It is only the company's convenience, when the company requires the car or the space in which the car stands. Ordinarily the carload shipments are unloaded by the consignee.

Mr. SLUSSER. As a matter of convenience to the consignee?

Mr. GALLEHER. No, sir; as a matter of convenience to the railroad company the railroad company may unload the car in the warehouse.

Mr. WILSON. Is it your idea that if a man brings, say, five thousand pounds of freight to the railroad and tenders it for shipment, and it will only require, we will say, three bills of lading and three loadings for that amount of freight, and some other fellow comes along who has got a hundred pounds or a thousand pounds, and it will require a bill of lading for him, and then maybe twenty bills of lading for the other people that are shipping, that there ought to be a difference made between those people?

Mr. SLUSSER. Oh; if it is shipped L. C. L., there ought to be a difference.

Mr. WILSON. You say there ought to be a difference?

750 Mr. SLUSSER. Yes; if they are required to make several bills of lading.

Mr. WILSON. That is, if there is one shipper who ships five thousand pounds and another who ships a hundred pounds, that the company ought to make different rates to them?

Mr. SLUSSER. No; I do not say that. I am trying to find out whether there is any greater expense to the railroad company in handling L. C. L. shipments in this through service in the way which has been described here than there is in handling the C. L. service.

Mr. WILSON. Your argument applies between L. C. L. shippers now just the same.

Mr. SLUSSER. If the shipment was made by a forwarding agent, there would be but one bill of lading, and it would be tendered under exactly the same conditions as a C. L. shipment.

Mr. WILSON. But, to follow your argument another step, there might be one cost where L. C. L. shipments were made and there were through bills of lading and another where there were twenty, and according to your argument you would have to make a difference in the rate charged to L. C. L. shippers.

751 Mr. SLUSSER. You do not make any difference. If there are only two, you charge the same as though there are twenty.

Mr. GALLEHER. We charge the tariff rate, no matter what the quantity is.

Mr. SLUSSER. And you do that because the matter of the billing forms only an infinitesimal part of the service which you render. The cost of the transportation of the goods by your train service from New York to Chicago constitutes the greater part of the service which you render, does it not? Is not that true?

Mr. GALLEHER. Well, the terminal services in New York and Chicago are both expensive.

Mr. SLUSSER. But at New York it is the same whether it is C. L. or L. C. L.

Mr. GALLEHER. At the freight piers that I mentioned: yes.

Mr. SLUSSER. That is all I wanted to find out. That is all.

The CHAIRMAN. That seems to be all. Anything further, 752 gentlemen? If not, we will consider the testimony closed.

Mr. SLUSSER. There is one matter that I should like to inquire about. I understand that under the rule the claimant is entitled to one copy of the testimony as written out by the official reporter. Now, I stand here as an intervening petitioner, and I am the only party that appears in behalf of the complainant. As far as I stand in that relation, is not that true? Now, I am asking as to whether or not I should be entitled to this copy from the official reporter, or whether I shall have to make a private arrangement for it.

The CHAIRMAN. If you and your people can not agree with the Export Shipping Company, I will settle it. We will furnish one copy of the testimony to the complainants and one to the defendants or one of them, and if they can not agree as to who that shall be, then I will settle it.

Mr. WILSON. There will be no difficulty about our agreeing on this side.

Mr. SLUSSER. I think they will agree, and I don't know but we will.

The CHAIRMAN. Do not trouble me about it until you disagree.

753 If there is nothing more in the way of testimony, it is understood that the matter will come up for argument on the 8th. I think our order required you to furnish your brief to the other side some days in advance of that, did it not?

Mr. SLUSSER. By the 1st.

The **CHAIRMAN.** So they may know your position in this case.

Thereupon, at six o'clock p. m., the testimony being closed, the argument of this case was adjourned until January 8th, 1908.

754

Opinion.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

Before Lacombe and Ward, circuit judges, and Martin, district judge.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD
Company. The Wabash Railroad Company.
The New York, Chicago and St. Louis Railroad
Company, and The Baltimore and Ohio Rail-
road Company,

v.s.

INTERSTATE COMMERCE COMMISSION, THE EXPORT
Shipping Company, and Edward B. Boise, as
trustee in bankruptcy of the Export Shipping
Company.

Per curiam:

A majority of the court is in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and do not think it necessary to add anything to his exhaustive discussion of the questions presented.

An injunction will be granted suspending the operation of the order of June 22, 1908. Inasmuch as both sides, upon the oral argument, agreed that the facts were fully presented, this application may, if all parties consent, be turned into a submission on final hearing and disposed of accordingly.

Nov. 27th, 1908.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed
Nov. 27, 1908. John A. Shields, clerk.

755

Memorandum—Per curiam.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

Before Lacombe, Ward, and Martin, circuit judges.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD
Company

v.s.

INTERSTATE COMMERCE COMMISSION.

Petition for leave to intervene as parties defendant.

Per curiam:

In granting this application of the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manu-

facturers and Shippers Association this court is not to be understood as sanctioning a practice which would allow every interested person to intervene in proceedings of this nature. The application is granted in this case because it appears that the three intervenors above named were the persons who actually tried and argued the case before the Interstate Commerce Commission, and because the Commission itself asks that the application be granted. Such intervention, however, shall not be allowed to delay the progress of the cause and the intervenors shall accept all action and unite in all stipulations had or made by the defendant, the Interstate Commerce Commission.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 18, 1909. John A. Shields, clerk.

756

Order.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

DELAWARE, LACKAWANNA & WESTERN RAIL-
road Company, Wabash Railroad Com-
pany, New York, Chicago & St. Louis
Railroad Company, and Baltimore & Ohio
Railroad Company, complainants,
against
INTERSTATE COMMERCE COMMISSION, EXPORT
Shipping Company, and Edward B. Boise,
as trustee in bankruptcy of the Export
Shipping Company, defendants.

In equity. No. 3-141.

Now, on this 17th day of February, 1909, come the American Forwarding Company, Trans-Continental Freight Company, Rockford Manufacturers and Shippers Association, and Grand Rapids Furniture Manufacturers Association and present their petition, verified the 6th day of February, 1909, praying for leave to intervene in this cause and be made parties hereto and have notice of all proceedings taken herein:

Whereupon, on reading and filing proof of due service of said petition and order to show cause thereon, upon the solicitors for all the parties appearing herein, and after hearing Arthur H. Masten, of counsel for said petitioners, in support of said petition, and Douglas Swift, of counsel for Delaware, Lackawanna & Western Railroad Company, Wabash Railroad Company, New York, Chicago & St. Louis Railroad Company, and Baltimore & Ohio Railroad Company, in opposition thereto, and P. J. Farrell, of counsel for Interstate Commerce Commission, appearing and consenting to the intervention, and on reading and filing the said petition, and on all the pleadings and papers in this cause, and it appearing to the court

just and proper, now, on motion of Masten & Nichols, solicitors for the said petitioners, it is

Ordered, That the said petition be, and the same hereby is, granted, in so far as concerns the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers Association, and that said petitioners be, and they hereby are, admitted as parties defendant herein, with liberty to plead and to be heard in all matters arising in this cause, and are to be entitled to notice of all proceedings herein; provided, however, in order not to delay the progress of the cause, that the said intervenors shall accept all action and unite in all stipulations heretofore had or made by the defendant, the Interstate Commerce Commission.

E. H. LACOMBE,
U. S. Circuit Judge.

Service accepted this 23rd day of February, 1909.

P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

Service of copy of within order admitted this 23rd day of February, 1909.

WILLIAM S. JENNEY,
DOUGLAS SWIFT,
Solicitors for Complainants.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Feb. 25, 1909. John A. Shields, clerk.

757 *Decree.*

In the Circuit Court of the United States for the Southern District of New York.

In equity.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
Company, the Wabash Railroad Company, the New
York, Chicago & St. Louis Railroad Company, and
the Baltimore & Ohio Railroad Company, com-
plainants,

v.s.

INTERSTATE COMMERCE COMMISSION, THE EXPORT SHIP-
ping Company, and Edward B. Boise, as trustee in
bankruptcy of the Export Shipping Company, de-
fendants, and the American Forwarding Company,
Trans-Continental Freight Company, and Rockford
Manufacturers and Shippers Association, intervenors.

Whereas a bill in equity was filed in the above entitled cause on the chancery side of this court on the 15th day of October, 1908, to

set aside and annul an order of the Interstate Commerce Commission dated June 22, 1908, made and filed in a certain proceeding then pending before the said Interstate Commerce Commission, wherein the Export Shipping Company was complainant, and the Wabash Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Baltimore and Ohio Railroad Company were defendants, and to perpetually enjoin any action or proceeding thereunder either by the said Commission or by the said defendants the Export Shipping Company or Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company; and

Whereas the said Interstate Commerce Commission thereafter duly appeared herein and filed its answer herein; and

758 Whereas the said the Export Shipping Company and the said Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, have failed and neglected to appear herein or to demur, plead to, or answer the complaint herein, and an order taking the said bill pro confesso as against the said defendants having been entered herein on the 11th day of January, 1909; and

Whereas thereafter a motion came duly on to be heard before this court on a notice of motion dated October 29, 1908, wherein the complainants asked for an order herein suspending enforcement of the aforesaid order of June 22, 1908, of the said Interstate Commerce Commission and for an injunction restraining any and all proceedings thereunder pending the final hearing and determination of this cause, and after having heard the aforesaid motion, and after reading and filing the pleadings herein and the aforesaid notice of motion and the affidavits of William S. Jenney and Burns D. Caldwell, each verified the 29th day of October, 1908, and the stenographers minutes of the testimony taken and proceedings had before the Interstate Commerce Commission on the 28th day of October, 1907, and the 20th day of December, 1907, in a certain proceeding in which the Export Shipping Company was complainant and the Delaware, Lackawanna and Western Railroad Company, the New York, Chicago and St. Louis Railroad Company, the Wabash Railroad Company, and the Baltimore and Ohio Railroad Company were defendants, and upon a report, order, and opinion in said proceedings dated the 22nd day of June, 1908, and after hearing William S. Jenney, esq., of counsel for the complainants, and P. J. Farrell, esq., of counsel for the said defendant, Interstate Commerce Commission, and this court after due deliberation had, having rendered

an opinion herein under date of November 30, 1908, ordered
759 that a writ of injunction issue out of and under the seal of this court, directed to the Interstate Commerce Commission, the Export Shipping Company, and Edward B. Boise, trustee in bankruptcy of the Export Shipping Company, enjoining and restraining them and each of them and each of their servants, agents and attorneys from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute any action or proceeding whatsoever

to enforce said order dated June 22, 1908, of said Interstate Commerce Commission, or any proceeding whatsoever under or based upon said order or any disobedience thereof until the final hearing and determination of this cause, and the entrance of a decree by this court therein or until the further order of this court, and thereafter an injunction having issued out of this court under date of November 30, 1908, wherein and whereby the aforesaid Interstate Commerce Commission, and the aforesaid the Export Shipping Company, and the aforesaid Edward B. Boise, trustee in bankruptcy of the Export Shipping Company, and each of them, and their respective servants, agents, and attorneys, were enjoined and restrained from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute any action or proceeding whatsoever to enforce the said order dated June 22, 1908, of the Interstate Commerce Commission; and

Whereas the American Forwarding Company, Transcontinental Freight Company, and Rockford Manufacturers and Shippers Association thereafter duly intervened herein and duly filed their answer to the aforesaid bill of complaint; and

Whereas the aforesaid complainants duly filed their replication to the aforesaid answers; and

Whereas thereafter the aforesaid complainants and the aforesaid the Interstate Commerce Commission and the aforesaid intervenors having filed in this court a stipulation bearing date 760 April 26, 1909, wherein and whereby it is consented and agreed that this cause may be treated as having been submitted on the final hearing and that a final decree may be made and entered herein upon such submission:

Now, therefore, it is ordered, adjudged, and decreed that the aforesaid order of the Interstate Commerce Commission, under date of June 22, 1908, hereby is set aside and declared to be null, void, and of no effect; and it is further

Ordered, adjudged, and decreed that an injunction issue herein directed to the aforesaid the Interstate Commerce Commission, and the aforesaid the Export Shipping Company, and the aforesaid Edward B. Boise, trustee in bankruptcy of the Export Shipping Company, perpetually enjoining and restraining them and each of them and their respective servants, agents, and attorneys from taking, instituting, or prosecuting, or attempting to take, institute, or prosecute any action or proceeding whatsoever to enforce the said order dated June 22, 1908, of the said the Interstate Commerce Commission, made and filed in a certain proceeding then pending before the said Commission wherein the Export Shipping Company was complainant and the Delaware, Lackawanna and Western Railroad Company, the Wabash Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Baltimore and Ohio Railroad Company were defendants.

E. H. LACOMBE,
U. S. Circuit Judge.

We hereby waive notice of the settlement and consent to the terms of the within decree.

761

WILLIAM S. JENNEY,

DOUGLAS SWIFT,

Attorneys for Complainant

HENRY A. WISE,

United States Attorney, Southern District of New York

P. J. FARRELL,

Attorneys for Defendant

MASTEN & NICHOLS,

Attorneys for Intervenors

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed June 4, 1909. John A. Shields, clerk.

762

Stipulation.

In the Circuit Court of the United States for the Southern District of New York.

In equity.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, and the Baltimore & Ohio Railroad Company, complainants,

v.s.

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants, and the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers Association, intervenors.

In equity. No. 3-11

Stipulation.

Whereas a bill in equity was filed in the above entitled action in the chancery side of this court, on the 15th day of October, 1908, to set aside and annul an order of the Interstate Commerce Commission, dated June 22nd, 1908, made and filed in a certain proceeding then pending before the said Commission, wherein the Export Shipping Company was complainant and the Wabash Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Baltimore and Ohio Railroad Company were defendants, and to perpetually enjoin any action or proceeding thereunder; and

Whereas the Interstate Commerce Commission appeared and filed
an answer herein on the 7th day of November, 1908, and the
763 complainants filed a replication herein on the 14th day of
November, 1908; and

Whereas the Export Shipping Company and Edward B. Boise, as
trustee in bankruptcy of the Export Shipping Company, have not
entered an appearance or filed a demurrer, plea, or answer herein, and
an order taking the said bill pro confesso as against the said defendant,
the Export Shipping Company and Edward B. Boise, as trustee
in bankruptcy of the Export Shipping Company, was duly entered on
the 11th day of January, 1909, in the order book; and

Whereas upon a motion for a preliminary injunction in this action,
which came regularly on to be heard on the 9th day of November,
1908, an order was made and filed on the 30th day of November, 1908,
suspending the said order of the Interstate Commerce Commission,
dated June 22nd, 1908, until the final hearing and determination of
this action, and directing the issuance of an injunction out of and
under the seal of this court, directed to the Interstate Commerce Commis-
sion, the Export Shipping Company, and Edward B. Boise, as
trustee in bankruptcy of the Export Shipping Company, enjoining
and restraining them, and each of them, from taking, instituting or
prosecuting any action or proceeding to enforce said order of the
Interstate Commerce Commission dated June 22nd, 1908, or any pro-
ceeding under or based upon said order or any disobedience thereof,
until the final hearing and determination of this action; and

Whereas the opinion of this court upon said motion for a prelimi-
nary injunction contains the following: "Inasmuch as both sides,
upon the oral argument, agreed that the facts were fully presented,
his application may, if all parties consent, be turned into a submis-
sion on final hearing and disposed of accordingly:"

Now, therefore, the solicitors for the complainants, the solici-
64 tors for the Interstate Commerce Commission, and the solicitors
for said interveners, hereby stipulate and agree that this cause
may be treated as having been submitted on the final hearing and after
final decree herein upon the application for preliminary injunction
heretofore made herein which came regularly on to be heard on the 9th
day of November, 1908, and upon the papers, pleadings, and proceed-
ings had and submitted upon such application and the argument of
counsel made thereon and that a final decree may be made and entered
herein upon such submission.

And it is further stipulated and agreed that the record upon any
appeal that may be taken to the Supreme Court of the United States
in the final decree herein shall be made up of the bill of complaint
and exhibits thereto, the answer of the Interstate Commerce Commis-
sion and exhibits thereto, the answer of said interveners, the replica-
tion, the orders and decrees and the per curiam opinion of the circuit
court herein, the affidavit submitted upon the application to this court
for a preliminary injunction, and the stenographer's minutes of the

testimony adduced before the Interstate Commerce Commission in proceeding wherein the Export Shipping Company was complainant and the Wabash Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the New York, Chicago and St. Louis Railroad Company, and the Baltimore and Ohio Railroad Company were defendants, and exhibits introduced in connection with said testimony.

Dated at New York, April 26th, 1909.

WILLIAM S. JENNEY,

DOUGLAS SWIFT,

Solicitors for Complainants

HENRY A. WISE,

United States Attorney for the Southern District of New York

P. J. FARRELL,

Solicitor for the defendant Interstate Commerce Commission

MASTEN & NICHOLS,

Solicitors for Intervenors

(Endorsed:) U. S. Circuit Court, Southern District N. Y. File
May 13, 1909. John A. Shields, clerk.

766

Notice of appeal.

In the Circuit Court of the United States for the Southern District of New York.

In equity.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, and the Baltimore & Ohio Railroad Company, complainants,
vs.

INTERSTATE COMMERCE COMMISSION, THE Export Shipping Company, and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants, and the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, intervenors.

Please take notice that the undersigned, on behalf of the Interstate Commerce Commission, the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, hereby appeal from the decision of this Court.

rendered herein and dated on the 4th day of June, 1909, to the Supreme Court of the United States.

Dated at New York, June 5, 1909.

HENRY A. WISE,

*United States Attorney for the Southern District of New York,
Solicitor for the Interstate Commerce Commission.*

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

MASTEN & NICHOLS,

Solicitors for Intervenors.

67 (Endorsed:) Due service of a copy of the within is hereby admitted. New York, June 14, 1909. John A. Shields, clerk.—U. S. Circuit Court, Southern District, N. Y. Filed Jun. 16, 1909. John A. Shields, clerk.

68 In the Circuit Court of the United States for the Southern District of New York.

Petition for appeal.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, and the Baltimore & Ohio Railroad Company, complainants,

v.s.

INTERSTATE COMMERCE COMMISSION, THE EXPORT SHIPPING Company and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants, and the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, interveners.

To the Honorable Judges of said Court:

The Interstate Commerce Commission, the American Forwarding company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, by Henry A. Wise, esq., United States attorney for the Southern District of New York, and P. J. Farrell, solicitors for the Interstate Commerce Commission, and Masten & Nichols, solicitors for the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, conceiving themselves aggrieved by the order and decree made and entered by the above-mentioned Circuit Court in the above-entitled cause on the 4th day of June, 1909, directing an injunction to issue restraining and suspending the enforcement of an order of the Interstate Commerce Commission, complain that there is manifest error to their injury and for the reasons set forth in the assignment of errors filed herewith,

pray that this the defendants' petition for their appeal from the above-mentioned decree or order may be allowed to the Supreme Court of the United States.

HENRY A. WISE,

*United States Attorney for the Southern District of New York,
Solicitor for the Interstate Commerce Commission.*

P. J. FARRELL,

Solicitor for Interstate Commerce Commission.

MASTENS & NICHOLS,

Solicitors for Intervenors.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, June 14, 1909. William S. Jenney, Douglas Swift, attorneys for complainants. U. S. Circuit Court, Southern District N. Y. Filed Jun. 16, 1909. John A. Shields, clerk.

770 In the Circuit Court of the United States for the Southern District of New York.

Order allowing appeal.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, and the Baltimore & Ohio Railroad Company, complainants,

vs.

INTERSTATE COMMERCE COMMISSION, THE EXPORT SHIPPING Company, and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants, and the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, intervenors.

On reading and filing the petition of the Interstate Commerce Commission, the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, presented by Henry A. Wise, esq., United States attorney for the Southern District of New York, and P. J. Farrell, solicitors for the Interstate Commerce Commission, and Mastens & Nichols, solicitors for the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, for an order allowing an appeal and the assignment of errors herein, and it appearing that the matter in dispute in said cause exceeds the sum of two thousand dollars (\$2,000.00), exclusive of costs, it is

Ordered that the said appeal be, and the same is hereby, allowed and that a certified transcript of the record herein be furnished

771 with transmitted to the Supreme Court of the United States.

E. HENRY LACOMBE,
Circuit Court Judge.

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, June 14, 1909. William S. Jenney, Douglas Swift, attorneys for complainants. U. S. Circuit Court, Southern District N. Y. Filed Jun. 22, 1909. John A. Shields, clerk.

772 In the Circuit Court of the United States for the Southern District of New York.

Assignment of errors.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, and the Baltimore & Ohio Railroad Company, complainants,

v.s.

INTERSTATE COMMERCE COMMISSION, THE EXPORT SHIPPING Company, and Edward B. Boise, as trustee in bankruptcy of the Export Shipping Company, defendants, and the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, interveners.

And now comes the Interstate Commerce Commission, by Henry A. Wise, United States attorney for the Southern District of New York, and P. J. Farrell, solicitors, the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association by Masten & Nichols, their solicitors, and charge that in the order and decree rendered by said Circuit Court for said district in the above entitled cause on the 4th day of June, 1909, wherein and whereby said court suspended the order of the Interstate Commerce Commission as therein shown and restrained and enjoined the enforcement of the same, and in the record and proceedings therein there is manifest error to their injury in this case, to wit :

I. The said Circuit Court erred in not dismissing the complaint for want of jurisdiction;

773 II. Said Circuit Court erred in not dismissing the complaint for want of equity.

III. Said Circuit Court erred in holding that Note to Rule 5-B and Rule 15-E were lawful rules or regulations.

IV. Said Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled previous to the time when it was offered to the carrier for transportation at point of origin, in determining whether or not the carload shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under cir-

cumstances and conditions which were substantially similar to the circumstances and conditions pertaining to the transportation by the carrier of the carload shipments which were owned entirely by either the consignor or the consignee.

V. Said Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled subsequent to the time when it was delivered by the carrier to the consignee at point of destination, in determining whether or not the carload shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially similar to the circumstances and conditions pertaining to the transportation by the carrier of the carload shipments which were owned entirely by either the consignor or the consignee.

VI. Said Circuit Court erred in holding that a bailee for hire of merchandise when he tenders traffic to a carrier for transportation from a point in one State to a point in another State is not a person

Within the meaning of section 2 of the act to regulate commerce.

774 VII. Said Circuit Court erred in holding that as a matter of law the shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially dissimilar from the circumstances and conditions pertaining to the transportation by the carrier of the shipments which were entirely owned by either the consignor or the consignee.

VIII. Said Circuit Court erred in holding that as a matter of fact the shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially dissimilar from the circumstances and conditions pertaining to the transportation by the carrier of the shipments which were entirely owned by either the consignor or the consignee.

HENRY A. WISE,

*United States Attorney for the Southern District of New York,
and Solicitor for the Interstate Commerce Commission.*

P. J. FARRELL,

Solicitor for the Interstate Commerce Commission.

MASTEN & NICHOLS,

Solicitors for the Intervenors.

(Endorsed:) Due service of a copy of the within is hereby submitted. New York, June 14, 1909. William S. Jenney, Douglass Swift, attorneys for complainants. U. S. Circuit Court, Southern District N. Y. Filed Jun. 16, 1909. John A. Shields, clerk.

775 The United States of America for the Second Judicial Circuit.

The President of the United States to the Delaware, Lackawanna & Western Railroad Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, Baltimore & Ohio Railroad Company, and William S. Jenney and Douglas Swift, their solicitors of record, greeting:

Citation on appeal.

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof pursuant to the appeal sued out and filed in the clerk's office in the United States Circuit Court for the Southern District of New York in the case wherein the Delaware, Lackawanna & Western Railroad Company, the Wabash Railroad Company, the New York, Chicago & St. Louis Railroad Company, and the Baltimore & Ohio Railroad Company were plaintiffs, the Interstate Commerce Commission, the Export Shipping Company, and Edward B. Boise as trustee in bankruptcy of the Export Shipping

Company, were defendants, and the American Forwarding
776 Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers Association were interveners, to show cause, if any there be, why the decree rendered against the said Interstate Commerce Commission, the Export Shipping Company, Edward B. Boise as trustee in bankruptcy of the Export Shipping Company, the American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers Association, as in said petition for appeal mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness:

The Honorable
The Honorable
The Honorable

*U. S. Circuit Court Judges, for the Second Judicial Circuit,
this 22 day of June, in the year of our Lord 1909.*

E. HENRY LACOMBE,

Circuit Judges.

777 (Indorsed:) Original. U. S. Circuit Court, Southern District of New York. Eq. 3/141. The Delaware, Lackawanna and Western R. R. Co. et al., complainants, versus Interstate Commerce Com. et al., and the Amer. Forwarding Co. et al., interveners. E. & A. C. 2925. Citation on appeal. Henry A. Wise, United States attorney, attorney for —

Due service of a copy of the within is hereby admitted. New York, June 19, 1909. William S. Jenney, Douglas Swift, attorney for complainants.

U. S. Circuit Court, Southern District N. Y. Filed Jun. 22, 1909.
John A. Shields, clerk.

778 Supreme Court of the United States.

THE INTERSTATE COMMERCE COMMISSION, THE
American Forwarding Company, Trans-Continental Freight Company, and Rockford Manufacturers and Shippers' Association, plaintiffs in error (defendants below),

against

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, The Wabash Railroad Company, The New York, Chicago and St. Louis Railroad Company, and The Baltimore and Ohio Railroad Company, defendants in error (complainants below). The Export Shipping Co. & Edward B. Boise, trustee in bankruptcy of The Export Shipping Co. (defendants below).

No. . Term 19

Whereas in the transcript of the record transmitted by the clerk of the Circuit Court of the United States for the Southern District of New York to this court in the above-entitled cause, the bill of complaint in this action in the Circuit Court and the exhibits annexed thereto are set forth twice: First, under the title "bill of complaint;" and, second, as a part of the motion papers submitted on the application for an injunction pendente lite in this action in the Circuit Court; and

Whereas the parties hereto desire that the said bill of complaint and exhibits be incorporated in the printed record but once and be omitted from said record where they appear as part of said motion papers, provided such omission shall be to the clerk of this court seen proper: Therefore, it is hereby

Stipulated and agreed by and between the counsel for the
779 respective parties to this action, that the clerk shall omit from the printed record the said bill of complaint and the exhibits attached thereto, marked Exhibits "A," "B," "C," and "D," respectively, where the same appear as a part of the motion papers submitted on the application for an injunction pendente lite in this action in the Circuit Court, the said bill of complaint and exhibits commencing at folio 76 of said motion papers, as contained in the transcript of the record transmitted to this court by the clerk of the Circuit Court, and ending at folio 375 of said motion papers; it is

Further stipulated and agreed that in place of said bill of complaint and exhibits so omitted there shall be inserted in the printed record the following words, viz:

"The bill of complaint and exhibits attached thereto, which form part of the motion papers submitted on the application for an injunction pendente lite in this action in the Circuit Court of the United States for the Southern District of New York, are here omitted from this record because they are hereinbefore incorporated at pages . . ."

Dated New York, August 24, 1909.

HENRY A. WISE,
*U. S. Atty. & Solicitor for the
Interstate Commerce Commission.*

P. J. FARRELL,
*Counsel for Plaintiff in Error, the
Interstate Commerce Commission.*

780 MASTEN & NICHOLS,
*Counsel for Plaintiffs in Error, The American For-
warding Company, Trans-Continental Freight
Company, and Rockford Manufacturers and
Shippers' Association.*

W. S. JENNEY,
Counsel for Defendants in Error.

781 (Indorsed:) Supreme Court of the United States. The Interstate Commerce Commission, The American Forwarding Company, et al. vs. The Delaware, Lackawanna and Western Railroad Company et al. Stipulation. W. S. Jenney, counsel for defendants in error. Office of the clerk Supreme Court U. S. Received Aug. 26, 1909.

782 (Indorsed:) File No. 21820. Supreme Court U. S. October term, 1909. Term No. 594. Interstate Commerce Commission et al., appellants, vs. The Delaware, Lackawanna and Western R. R. Co. et all. Stipulation to omit parts of record in printing. Filed Sept. 11th, 1909.

783 In the Supreme Court of the United States. October Term, 1909.

INTERSTATE COMMERCE COMMISSION ET AL., AP-
PELLANTS AND PLAINTIFFS IN ERROR,

v.

THE DELAWARE, LACKAWANNA & WESTERN
Railroad Co. et al., APPellees and defendants
in error, The American Forwarding Co. et al.,
intervenors.

No. . .

Stipulation.

It is hereby stipulated and agreed by and between counsel for the parties to the above-entitled cause that the certified copy hereto attached of the certificate of the Attorney-General under the expediting

act approved February 11, 1903, filed in the Circuit Court of the United States for the Southern District of New York, shall be added to the transcript of the record herein on file in the Supreme Court

LLOYD W. BOWERS,

Solicitor General.

WILLIAM S. JENNEY,

Counsel for Appellees and Defendants in Error.

ARTHUR M. MASTEN,

MASTEN & NICHOLS,

Counsel for Intervenors.

SEPTEMBER 10, 1909.

784 In the Circuit Court of the United States for the Southern District of New York.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY ET AL.

v.

INTERSTATE COMMERCE COMMISSION ET AL.

To the clerk of said court:

I hereby certify that the above-entitled cause now pending in said court is a suit in equity brought by the Delaware, Lackawanna and Western Railroad Company et al. against the Interstate Commerce Commission et al. under the act of Congress entitled "An act to regulate commerce," as amended by the act of June 29, 1906, and that said suit is, in my opinion, a case of general public importance.

I therefore request that, complying with the provisions of the act of Congress entitled "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February 4, 1887, or any other acts having a like purpose that may be hereafter enacted," approved February 11, 1903; and in further compliance with the provisions contained in section 16 of the "Act to regulate commerce," approved June 29, 1906, you will file this certificate among the records of the above-entitled cause, and immediately furnish a copy thereof to each of the circuit judges of the Second Circuit, to the end that said case shall be given precedence over other cases in said court, and be assigned for hearing at the earliest practicable date before not less than three of the circuit judges of said circuit, as is provided by the said act of February 11, 1903.

785

CHARLES J. BONAPARTE,
Attorney General.

WASHINGTON, D. C., November 2, 1908.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Nov. 3, 1908. John A. Shields, clerk.

A copy.

[SEAL.]

JOHN A. SHIELDS, Clerk.

785½ (Indorsed:) File No., 21820. Supreme Court U. S. October term, 1909. Term No., 594. Interstate Commerce Commission et al., appellants, vs. Delaware, Lackawanna & Western Railway Co. et al. Stipulation of counsel and addition to record. Filed Sept. 21st, 1909.

786 In the Supreme Court of the United States. October term, 1909.

INTERSTATE COMMERCE COMMISSION ET AL.,

appellants and plaintiffs in error,

v.

THE DELAWARE, LACKAWANNA & WESTERN Railroad Co. et al., appellees and defendants in error; The American Forwarding Co. et al., intervenors.

NO. 594.

Stipulation.

It is hereby stipulated and agreed by and between counsel for the parties to the above-entitled cause that the fifth assignment of errors contained in the transcript of the record herein on file in the Supreme Court shall be amended by inserting therein after the words ". . . were transported by the carrier under circumstances and conditions" and preceding the words "pertaining to the transportation by the carrier," etc., the words "which were substantially similar to the circumstances and conditions," in order to make the assignment correspond with assignment of errors number four (4).

LLOYD W. BOWERS,
Solicitor General.

WILLIAM S. JENNEY,
Counsel for Appellees and Defendants in Error.

ARTHUR H. MOSHER,
Counsel for Intervenors.

SEPTEMBER 21, 1909.

787 (Indorsed:) File No., 21820. Supreme Court U. S. October term, 1909. Term No., 594. Interstate Commerce Commission et al., appellants, vs. The Delaware, Lackawanna & Western R. R. Co. et al. Stipulation amending assignment of errors. Filed Sept. 24th, 1909.

(Indorsement on cover:) File No., 21820. S. New York, C. C. U. S. Term No., 594. Interstate Commerce Commission, The American Forwarding Company et al., appellants, vs. The Delaware, Lackawanna & Western Railroad Company; The Wabash Railroad Company; The New York, Chicago & St. Louis Railroad Company; and The Baltimore & Ohio Railroad Company. Filed September 11th, 1909. File No., 21820.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

INTERSTATE COMMERCE COMMISSION
et al., appellants,
v.
DELAWARE, LACKAWANNA AND WESTERN
Railroad Company et al., appellees.

} No. 594.

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

MOTION TO ADVANCE.

On behalf of the Interstate Commerce Commission, appellant, the Solicitor-General respectfully moves the court to advance the above-entitled cause for hearing during the present term for the following reasons:

1. This is an appeal by the Interstate Commerce Commission and by the American Forwarding Company, Transcontinental Freight Company, and Rockford Manufacturers and Shippers' Association, intervenors, from a final decree of the Circuit Court of the United States for the Southern District of New York, in a suit brought by the Delaware, Lackawanna and Western Railroad Company and other

common carriers under the provisions of section 16 of the act to regulate commerce, as amended and approved June 29, 1906, enjoining enforcement of an order of the Interstate Commerce Commission requiring said carriers to cease and desist from maintaining and enforcing certain rules or regulations whereby they seek to confine the privilege of shipping freight articles in carload lots at carload rates to cases where either the shipper or the consignee is the owner of all the articles in the car and to compel other shippers to pay greater rates, namely, the carriers' less-than-carload rates.

2. The act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, in section 16, makes the provisions of "An act to expedite the hearing and determination of suits in equity," etc., approved February 11, 1903, applicable to all such suits, and said section provides that cases of this character shall have in this court "priority in hearing and determination over all other causes except criminal causes."

I am authorized to state that counsel for the intervenors and counsel for the appellees concur in this motion.

LLOYD W. BOWERS.

Solicitor-General.

NOVEMBER, 1909.



In the Supreme Court of the United States.

OCTOBER TERM, 1909.

INTERSTATE COMMERCE COMMISSION
et al., appellants,
v.
THE DELAWARE, LACKAWANNA AND WEST-
ERN RAILROAD COMPANY et al., appellees. } No. 594.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This case comes here on appeal from the Circuit Court of the United States for the Southern District of New York, which issued a decree enjoining the enforcement of an order of the Interstate Commerce Commission.

The suit was brought by the railroad companies to restrain the enforcement of an order of the Commission directing the railroads, complainants in the Circuit Court, to desist from enforcing certain rules of the Official Classification, a tariff filed by the railroads with the Interstate Commerce Commission, which contained the classification of freight and rules and regulations governing the transportation thereof within the Official Classification territory.

On a motion for a temporary injunction restraining the enforcement of the order of the Commission the case came on for argument before two circuit judges and one district judge, on the pleadings in the Circuit Court, certain affidavits in support thereof, and on the evidence before the Commission. On June 4, 1909, the court entered a decree setting aside the order. It was thereafter stipulated by counsel that the case should be treated as having been submitted on final hearing (Record, p. 305), and that a final decree be entered. It was further agreed that the record upon appeal to the Supreme Court of the United States on the final decree should be made up of the bill of complaint and exhibits thereto, the answer of the Commission and exhibits thereto, the answer of the intervenors, the replication, orders and decrees, and per curiam opinion of the Circuit Court, the affidavit submitted upon the application for a preliminary injunction, and the stenographer's minutes of the testimony taken before the Interstate Commerce Commission. (Record, p. 305.)

ACT OF THE COMMISSION.

Upon a complaint and a full hearing thereon before the Commission, that body held that certain rules of the Official Classification were "unjustly discriminatory, unjust, unfair, and unreasonable" (Record, p. 27), and directed the railroads defendants before it to desist from enforcing such rules. *The rules complained of provided in substance that car load rates should not apply unless the consignor or car*

signee was the actual owner of all the property making up the carload. The Commission held that the rules were unreasonable, and said that a carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates. (Record, p. 27.)

The rules complained of are as follows (Record, p. 6):

RULE 5-B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car-service rules and charges of the forwarding railroad. (See Note.)

NOTE.—*Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.*

The complaint before the Commission was directed against the above note to Rule 5-B.

RULE 15-E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be way-billed as separate shipments and freight charged accordingly. (See Note.)

NOTE.—The term "forwarding agents" referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors at point of origin.

The Export Shipping Company is a forwarding agent; it brought the action before the Commission to recover sums equal to the difference between the freight charges collected in conformity with the rules above quoted and the charges which would have been collected had carload rates been applied to the shipments; it also asked for an order commanding the defendants to desist from enforcing the rules.

A forwarding company assembles at a given shipping point several lots of freight, of diverse ownership, until it has an amount sufficient to make a carload. It orders a car from the railroad company, loads it with merchandise, takes one bill of lading covering the goods showing them to be shipped in the name of one consignor to one consignee. Sometimes it receives the goods at the point of destination and distributes them to the various persons entitled thereto.

The Export Shipping Company claimed that it was entitled to the same carload rate as would apply if the goods were all owned by one consignee or one consignor. If this rule were adopted the owners of the various quantities of goods contained in the carload shipment would have their goods carried at the carload rates applicable to carload shipments.

The Export Shipping Company instituted three actions before the Commission, each involving the same questions of law.

In the first case, it delivered to the Wabash Railroad Company in Chicago 169 packages of various ownership, and caused to be issued a bill of lading showing the goods to be shipped by the Export Shipping Company and consigned to the Export Shipping Company, 9 Broadway, New York. (Record, p. 20.)

In the second case, it delivered to the New York, Chicago and St. Louis Railroad Company in Chicago 108 packages of various ownership, taking a bill of lading showing the merchandise to be shipped by E. Goldman & Co. and consigned to the order of E. Goldman & Co., New York. (Record, p. 26.)

In the third case, it delivered to the Baltimore and Ohio Railroad Company in Chicago 119 packages of various ownership, taking the bill of lading showing the merchandise to be shipped by the Export Shipping Company and consigned to the Export Shipping Company in New York City. (Record, p. 26.)

In each of the above cases there was in fact a carload shipment. The only question involved was whether the shipment was entitled to the carload rate. In each case the packages were severally owned by various persons in the city of Chicago and consolidated into one carload shipment by the Export Shipping Company and tendered to the railroad as such. In each case the railroad applied the note to

Rule 5-B and Rule 15-E; hence the action before the Commission to recover the difference.

The report and opinion of the Commission, by Mr. Commissioner Lane, appears in the record, pages 25-27. The Commission held that the rules are unjustly discriminatory, unjust, unfair, and unreasonable, in that they provide that defendants shall collect a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce than defendants collect from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. It said that a carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates. (Record, p. 27.)

The order of the Commission (Record, p. 23) directed that the carriers strike out and omit and cease and desist from enforcing the note to Rule 5-B and Rule 15-E appearing in the official classification. It further provided:

"And said defendants are hereby further notified and required to cease and desist on or before said date from refusing to apply their carload rates to the transportation subject to the act to regulate commerce of carload lots consisting of packages of various ownership tendered as a single shipment by one consignor to one consignee.

"And said defendants are hereby further notified and required to cease and desist on or

before said date from making ownership or lack of ownership of property presented to them for transportation subject to the act to regulate commerce the test for the applicability to said transportation of said property of any of their rates whatsoever.

"And said defendants are hereby authorized to make said changes in their classification and rules effective upon three days' notice to the public and the Commission, given in the manner required by law."

The Commission also directed the defendants to pay to the complainant the difference between what it did pay and what it would have paid if the carload rates had been applied.

THE COMPLAINT IN THE CIRCUIT COURT.

Thereupon the carriers, defendants before the Commission, instituted a proceeding in the Circuit Court praying that a decree be made setting aside and annulling the order of the Commission and perpetually enjoining any action or proceeding thereunder.

The bill of complaint (Record, p. 4) recounts the proceedings before the Commission, describes in detail the business of a forwarding agent, the effect of such business upon the business of the carrier, attempts to justify the rules of the Official Classification tariff condemned by the Commission, and specifies the reasons on account of which it is urged that the order of the Commission should be set aside.

It is clear from an examination of the complaint that the railroads instituted their action in the

Circuit Court on the theory that the Commission had committed an error of law in its construction of section 2 of the Interstate Commerce Act, for the complaint does not attempt to show the effect of the enforcement of the order upon the revenues of the railroads, or allege that it is confiscatory, arbitrary, or unreasonable. The complaint attacks the reason given by the Commission for the issuance of the order, and not the effect of that order upon the railroads.

The theory of the complaint is that the Commission had no power to issue the order, for the reason that it was based on an erroneous construction of section 2 of the interstate-commerce act. The Commission held that all shippers are entitled to the same rates, irrespective of the question of ownership of the property constituting the shipment; that a railroad has no right to consider the ownership of the shipment as a basis for determining the applicability of its rates. It held that a forwarding agent is entitled to the same rates as an owner of a like amount of property. The railroads, on the other hand, contended before the Commission, and assert in their complaint, that in the two cases there are not "similar circumstances and conditions" within the meaning of section 2 of the Hepburn Act, and therefore the railroad may charge different rates in the two cases.

As the complainants brought their suit upon this theory they failed in their complaint to set out allegations specifying what would be the effect of the order of the Commission upon the revenues of the railroad. They neglected to allege that the order,

if enforced, will be confiscatory in its effect. The only allegation of this character is that stating that the order deprives complainants of the right to fix the terms upon which they will accept for transportation consolidated carloads from forwarding agents, to the consequent reduction of their net revenue and depreciation of their property, and that therefore the order is illegal and void, and takes their property without due process of law (Record, p. 16).

The gist of the complaint, therefore, is that the Interstate Commerce Commission attempted to legalize a discriminatory practice that violates the provisions of the interstate commerce act and requires complainants to participate in and be parties to such illegal practice, and that therefore the order is illegal and void, and the Interstate Commerce Commission had no power, jurisdiction, or authority of law to make the same. (Record, p. 18.)

Complainants annexed as exhibits to their bill the petition of the Export Shipping Company before the Interstate Commerce Commission (Record, p. 19), the answer of the railroad defendant therein (Record, p. 21), the order of the Commission (Record, p. 22), the opinion of the Commission (Record, p. 25), the dissenting opinion (Record, p. 27), and the opinion of the Commission in *California Commercial Association v. Wells Fargo & Co.* (Record, p. 50).

THE ANSWER OF THE COMMISSION.

The answer (Record, pp. 65-89) admits many of the allegations of the complaint. On page 68 certain errors in the statement of facts given in the com-

plaint are pointed out. In respect to each of the three shipments, it is denied that the Export Shipping Company acted as a forwarding agent, and it is, on the contrary, alleged that in the first case the company acted as the shipper of the traffic, and in the second case it acted as agent of the shippers of the traffic, and in the third case as the shipper.

The answer avers that the enforcement by the carriers of the rules complained of effects unjust discriminations between different shippers, in violation of section 2 of the act to regulate commerce (Record p. 74).

The answer denies the allegations respecting the character of the business of the forwarding agent. It denies that the forwarding agent is a mere freight scalper, and asserts, on the contrary, that the forwarding agent serves a useful purpose. It points out that many of the allegations of the complaint are based on mere speculation, and therefore can not be definitely answered. (Record pp. 72 et seq.)

The answer alleges that the application of a higher rate to the carload shipments of forwarding agents than to the carload shipments of a single owner is unlawful, unreasonable, unjust, unjustly discriminatory, unduly preferential, and unduly prejudicial in violation of the interstate commerce act (Record p. 77).

The answer then proceeds to allege the facts, circumstances, and conditions which defendant claims are a justification for the order of the Commission issued in the premises (Record, pp. 80-89).

As exhibits to the answer, the Commission annexed thereto the report and opinion of the Commission in the case of the *Buckeye Buggy Company v. C., C., C. & St. L. Ry. Co.* (Record, p. 89) and the report of the Interstate Commerce Commission in the matter of party rate tickets (Record, p. 98).

Complainants filed a replication (Record, p. 113).

Thereafter, on October 29, 1908, there was a motion for a temporary injunction (Record, p. 117). The Attorney-General filed a certificate November 2, 1908, pursuant to the provisions of the expediting act (32 Stat., 823) (Record, p. 314), and a hearing was had on November 9 on a motion for a preliminary injunction before Lacombe and Ward, circuit judges, and Martin, district judge (Record, p. 299).

In addition to the pleadings, the court had before it affidavits of William S. Jenney, vice-president of the Delaware, Lackawanna and Western Railroad, one of the complainants (Record, p. 118), and of Burns D. Caldwell, vice-president in charge of the traffic department of the Delaware, Lackawanna and Western (Record, p. 124), and the testimony before the Interstate Commerce Commission (Record, pp. 130-299).

On November 27, 1908, the court rendered an opinion (Record, p. 299) stating that it adopted the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Interstate Commerce Commission, and deemed it unnecessary to add anything to his exhaustive discussion of the questions presented.

Subsequently, on consent of counsel for both sides, the court issued an order granting leave to intervene to the American Forwarding Company, Transcontinental Freight Company, Rockford Manufacturers and Shippers' Association, and Grand Rapids Furniture Manufacturers' Association. (Record, p. 300.)

The decree of the Circuit Court adjudges that the order of the Commission be "set aside and declared to be null and void and of no effect." (Record, p. 303.)

Thereafter counsel filed a stipulation agreeing that the case should be treated as having been submitted on final hearing, and that a final decree should be made and entered upon such submission. (Record, p. 305.)

ASSIGNMENT OF ERRORS.

The following assignments of error will be urged in this brief (Record, p. 309):

First. The Circuit Court erred in not dismissing the complaint for want of jurisdiction.

Second. The Circuit Court erred in not dismissing the complaint for want of equity.

Third. The Circuit Court erred in holding that note to Rule 5-B and Rule 15-E were lawful rules or regulations.

Fourth. The Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled previous to the time when it was offered to the carrier for transportation at point of origin, in determining whether or not the carload shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were

transported by the carrier under circumstances and conditions which were substantially similar to the circumstances and conditions pertaining to the transportation by the carrier of the carload shipments which were owned entirely by either the consignor or the consignee.

Fifth. Said Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled subsequent to the time when it was delivered by the carrier to the consignee at point of destination, in determining whether or not the carload shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially similar to the circumstances and conditions pertaining to the transportation by the carrier of the carload shipments which were owned entirely by either the consignor or the consignee.

Sixth. Said Circuit Court erred in holding that a bailee for hire of merchandise when he tenders traffic to a carrier for transportation from a point in one State to a point in another State is not a person within the meaning of section 2 of the act to regulate commerce.

Seventh. Said Circuit Court erred in holding that as a matter of law the shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially dissimilar from the circum-

stances and conditions pertaining to the transportation by the carrier of the shipments which were entirely owned by either the consignor or the consignee.

Eighth. Said Circuit Court erred in holding that as a matter of fact the shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially dissimilar from the circumstances and conditions pertaining to the transportation by the carrier of the shipments which were entirely owned by either the consignor or the consignee.

In the first three assignments it is asserted, in substance, that the allegations of the bill of complaint and the findings of fact of the Circuit Court are not sufficient to support the decree of that court. In the fourth and fifth assignments it is asserted in substance, that in determining whether or not the transportation services were like and contemporaneous and performed by the carriers under substantially similar circumstances and conditions it was not proper for the Circuit Court to consider how or by whom the traffic was handled, either before it was tendered to the carrier for transportation at the point of origin or after it was delivered by the carrier to the consignee at point of destination. In the sixth assignment it is asserted, in substance, that a party who is rightfully in possession of personal property and clothed by the beneficial owners thereof with

authority to handle and ship same in his own name is a person within the meaning of section 2 of the act to regulate commerce. And in the seventh and eighth assignments it is asserted, in substance, that, whether the matter be treated as one of law or of fact, the transportation services were like and contemporaneous and performed by the carriers under substantially similar circumstances and conditions.

ARGUMENT.

I.

The Commission had power to make the order complained of.

The order of the Commission was made under the authority conferred by section 15 of the act to regulate commerce, the material portion of which reads as follows:

SEC. 15 (as amended June 29, 1906). That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section 13 of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable or unjustly discrim-

inatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

The parties who may complain and the matters concerning which complaints may be made are described in said section 13, as follows: "Any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts."

After full investigation on a complaint filed as provided in said section 13 the Commission made a report wherein it expressed the opinion that the regulation or practice of the appellees, whereby they discriminate between carload shippers through

the maintenance and enforcement of the note to Rule 5-B and Rule 15-E, was unjustly discriminatory, unjust, unfair, and unreasonable, in that the appellees collect a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce than they collect from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. (Rec., 27.) And thereupon the Commission held that the discrimination was a violation of section 2 of the act, and issued its order quoted above (p. 6).

The language of said section 2 is as follows:

That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

The extent of the judicial power to be exercised by the Circuit Court when a carrier attacks an order

of the Commission was determined by this court at the present term in the case of *Interstate Commerce Commission v. Illinois Central Railroad Company*. Mr. Justice White said:

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. (*Postal Telegraph Company v. Adams*, 155 U. S., 688, 698.) Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our concep-

tion as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is the question.

In closing his opinion, Mr. Justice White refers to certain arguments urged against the order of the Commission which attempted to show that the order would effect discriminations. He said:

At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils.

See also—

Honolulu Rapid Transit Company v. Hawaii (211 U. S., 282).

Knoxville v. Water Company (212 U. S., 1, 8, 18).

Prentis v. Atlantic Coast Line Company (211 U. S., 210).

Wilcox v. Consolidated Gas Company (212 U. S., 19, 41).

San Diego Land Company v. National City (174 U. S., 739).

Reagan v. Farmers' Loan & Trust Co. (154 U. S., 362, 397).

Clearly, the power exercised by the Commission in this case was within the authority conferred by the act of June 29, 1906 (34 Stat., 584). The Commission directed the railroads to discontinue enforcing certain rules which the Commission found were creating discriminations between shippers. (Rec., p. 74.)

The Circuit Court rendered no opinion beyond stating that a majority of the court were in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and that they did not think it necessary to add anything to his exhaustive discussion of the questions presented (Record, p. 299). The dissenting opinion of the chairman to which they refer and which they adopt appears in the record, pages 27 to 50. That opinion challenges merely the expediency of the order of the Commission. It states at length the reasons which actuated him in declining to agree with the decision of the majority; but the questions of expediency which the chairman and the Commission could properly consider, under the decision of this court in the Illinois Central case, had no place in the opinion of the Circuit Court. They were arguments addressed to the other members of the Commission calculated to prevent the issuance of the order, but in no way ques-

tioning the power of the Commission to issue the order if it deemed it expedient so to do.

That the order of the Commission is "within the scope of the delegated authority under which it purports to have been made" is apparent from an examination of its terms and all the circumstances under which it was issued.

The complaint of the railroads in the Circuit Court recites the facts attending the enforcement by them of the note to Rule 5-B and Rule 15-E, which were complained of. It appears that those rules are in force only in Official Classification territory and have no application in portions of the United States outside of that territory (Record, pp. 12, 74, 80-82). However, the number of carload rates so established and applied and the number of combinations so permitted are much greater in the official than in either of the other two territories named. While in the western and southern territories the right to make such combinations and use said carload rates is, regardless of the ownership of the traffic shipped, accorded to all shippers, including forwarding agents, the appellees and other carriers who operate lines of railway in the official territory undertake, by the application of note to Rule 5-B and Rule 15-E, above mentioned, to confine the right to make such combinations and use said carload rates to cases where either the consignor or consignee is the owner of all the traffic in the car. In all the territories, however, the application of the carload rate is confined to cases where the

traffic is shipped in the name of only one party, who acts as shipper, and all consigned to one consignee at one destination.

In the western and southern territories the rules of the carriers permit the mixing and consolidation of commodities for the several owners thereof by forwarding agents at carload rates. The rules effective in these territories are as follows:

SOUTHERN CLASSIFICATION No. 35.

[Effective May 1, 1908.]

RULE 24. (a) Carload rates shall apply only when a carload of freight is shipped from one station, in one day, by one shipper, to one consignee and destination. Only one bill of lading shall be issued for any such carload shipment. The minimum carload weight provided for on any article has reference to the minimum weight on which the carload rate will apply, when loaded in or upon one car (subject to Rule 24-C), although the actual weight may be less.

(b) Agents at destination must not distribute carload shipments of freight to two or more consignees. Agents at border points or at points within the territory covered by this classification must not act as forwarding or distributing agents for shippers or owners.

(c) Unless otherwise specified in the classification, the minimum carload weight of all articles shall be 24,000 pounds, or 12 tons, where the rate applies per net or gross ton.

RULE 25. (b) When no carload rate is specified for an article, the L. C. L. rate shall be

charged for any quantity of the article, and no two or more articles, each of which has a carload rate, shall be shipped in mixed carloads at the carload rate, unless so provided for in the classification.

WESTERN CLASSIFICATION No. 45.

[Effective November 1, 1908.]

RULE 6-A. Carload freight will be rated and charged according to the current rules governing maximum and minimum weights of carloads as authorized by the companies adopting this classification, except that the weights and charges on shipments in tank cars shall be based on the full gallonage capacity of tank. Provisions for carload ratings shown in the classification will apply only upon shipments received on one day from one consignor, under one bill of lading, and delivered under one expense bill to one consignee. Carload rates are not applicable on freight consigned to railroad agents.

RULE 21-A. Unless otherwise specified in the classification, where two or more articles are mentioned in one item or bracketed items, they may be forwarded in straight or mixed carloads at the rate shown, except as provided in Paragraph B of this rule:

"B. Carload rating shown in the classification for articles subject to rule 21-B will not apply on straight carloads of the articles named. In such cases the amount of the article so designated, which may be included, shall not exceed 33½ per cent of the minimum weight provided for the mixed carload."

Although as pointed out, the court has no power to inquire into the mere expediency of the order of the Commission, nevertheless if that question is examined, it becomes clear that the order will have the effect of benefiting the small merchant. The forwarding agent enables the merchant, doing business on a small scale, to compete with the large merchant, who always has the advantage of the carload rate. It is true that the small merchant who can not obtain the benefit of the forwarding agent is at a disadvantage as compared with his competitor who has such assistance, but it is to be remembered that the main competition of all merchants is with the larger competitors, and therefore a rule which enables the weaker to compete with the stronger, on the whole, removes inequalities rather than creates them.

Mr. Commissioner Lane forcibly states the arguments against a rule which classifies shippers according to their interest in the property shipped in *California Commercial Company v. Wells Fargo Company*, 14 I. C. C., 422, decided June 22, 1908, copied in the Record, pages 50-63. That was a case similar to this except that it related to the rates of an express company. The Commission held that the ownership of property tendered for shipment can not be made a test as to the applicability of a carrier's rates. Speaking of the rule of the carrier, Mr. Commissioner Lane said (Record, p. 61):

In considering the reasonableness of such a rule it is not to be overlooked that it is not practicable to enforce it. No carrier can

know who is the owner of property offered for shipment, nor whether the shipments offered are intended for the consignee named, or are to be distributed among other persons. The information of the Commission is sufficiently broad on this matter to state with authority that it is the business custom of many shippers to combine shipments; a group of farmers often purchase seed or fertilizer in small lots and ship in one name to one consignee, in order to secure the carload rate; dealers in machinery, which is difficult to load and unload, unite their purchases for purposes of transportation; one or more of the great steel companies sells its products only in carload lots, and small dealers unite in the purchase of a carload which is divided at destination; a great volume of the produce business of the country is handled at point of origin and destination by agents, who combine small shipments, both by express and rail, ship to themselves, and sell upon commission at destination. Is it practicable on each of the tens of thousands of such shipments made each day for the carrier to make such examination at point of origin and point of destination as will justify it in permitting or denying the lower rate on the grounds stated in the rule? If the rule is valid, it must be enforced. If not enforced in each proper case the carrier is guilty of a departure from its tariff provisions and subject to the penalties provided in the act. * * * A rule which it can not enforce a carrier should not make and certainly this Commission should not approve.

Few practices have become more firmly established in the transportation world than that of combining small quantities of freight of various owners and shipping at the relatively lower rates applicable to large consignments, and under this practice has developed an immense volume of traffic which otherwise could never have been brought into being. It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries and more surely establish the dominance of the greater industrial and commercial institutions.

See also the allegations of the answer (Record, p. 86, fols. 150-151).

II.

The Circuit Court erred in not dismissing the complaint for want of equity.

The railroads instituted their action in the Circuit Court on the theory that the Commission had committed an error of law in its construction of section 2 of the Hepburn Act, and that the Circuit Court had power to review the proceedings before the Commission in the sense of an appellate court. That section, which was not amended by the act of 1906, provides as follows:

SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any

service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other *person or persons* for doing for him or them a like contemporaneous *service* in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

In determining what are "substantially similar circumstances and conditions" the Commission held that the ownership of the property transported is not a fact to be taken into consideration. In other words, the circumstance that the person offering the carload shipment does or does not own all the property which makes up the shipment should not be considered by the railroad in applying the carload rate. The complainants urged that in this respect the Commission had erred, and that ownership is a fact which should be taken into account in determining whether or not there is a substantial similarity of conditions and circumstances. The Commission also held that the word "person" includes every party who acts as shipper of traffic.

As the complainants below proceeded on this erroneous theory, the complaint made no attempt to show what would be the effect upon the revenues of the railroads of an enforcement of the order, nor did it allege that the order was confiscatory, arbitrary, or unreasonable. The complaint attacked the reason

given by the Commission for the issuance of the order, and not the effect of that order upon the railroads.

There is an entire absence of any allegations raising questions of constitutional power or right.

There is no allegation that the order if enforced would be confiscatory in its effect. At most the complaint alleges that the order deprives complainants of the right to fix the terms upon which they will accept for transportation consolidated carloads from forwarding agents to the consequent reduction of their net revenues and depreciation of their property, and that therefore the order is illegal and void and takes their property without due process of law. (Record, p. 16.)

The gist of the complaint, therefore, is that the Interstate Commerce Commission attempted to legalize a discriminatory practice which violated the provisions of the interstate-commerce act and required complainants to participate in and be parties to such illegal practice, and that therefore the order was illegal and void and the Interstate Commerce Commission had no power, jurisdiction, or authority to make it. (Record, p. 18.) These allegations the answer denies.

The argument is completely answered in the Illinois Central case by Mr. Justice White, who dismissed a similar contention in that case that discriminations and preferences would arise from the enforcement of the order of the Commission. He said:

At best these arguments but suggest the complexity of the subject, and the difficulty

involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality.

Having made a finding of fact that the rules were unreasonable, the Commission had the power, under section 15 of the act of June 29, 1906, to restrain their enforcement in the future, and the courts can not inquire whether the Commission was justified by the evidence before it in arriving at the finding of fact.

In any event, the Commission committed no error in holding that the words "similar circumstances and conditions" refer to matters of carriage, and that "person" used in the same section has reference to the shipper and not to the owner of the property.

The appellees admit that the services rendered by them to a forwarding agent who is the shipper, and to an owner of property shipping it himself, are like and contemporaneous; that is, they admit that the traffic is of the same character and contemporaneously transported by them from the same point of origin over the same line in the same direction to the same point of destination, but they deny that the transportation services are performed by them in each instance under substantially similar circumstances and conditions. They also contend that the word "person" has reference to the actual owner and not to the shipper. (Record, p. 85.) This position is untenable. The forwarding agent ships the property, pays the freight, and is a person within the meaning of section 2.

In *Wight v. United States* (167 United States, 512, 518), Mr. Justice Brewer, writing the opinion of the court, said:

It was the purpose of the section to enforce equality between *shippers*, and it prohibits any rebate or other device by which two *shippers*, shipping over the same line the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

In *Interstate Commerce Commission v. Alabama Midland Ry.* (168 U. S., 144, 166), Mr. Justice Shiras said:

As we have shown in the recent case of *Wight v. United States* (167 U. S., 512), the purpose of the second section is to enforce equality between shippers over the same line and to prohibit any rebate or other device by which two shippers, shipping over the same line the same distance under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage and does not include competition between rival routes.

III.

The Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled before it was tendered to the carrier for transportation at point of origin and after it was delivered by the carrier to the consignee at point of destination, in determining whether or not the transportation services were like and contemporaneous.

raneous and performed by the carrier under substantially similar circumstances and conditions.

Section 2 of the act to regulate commerce was passed to prevent in this country the same discriminations which are prohibited in England by section 90 of the railway clauses consolidation act, known as and called the "equality clause," and this court will presume that the Congress in adopting the language of the English act had in mind the construction given to that language by the English courts, and intended to incorporate it into the American act.

Texas & P. R. Co. v. Interstate Commerce Commission (162 U. S., 197), *Interstate Commerce Commission v. Baltimore & O. R. Co.* (145 U. S., 263), *McDonald v. Hovey* (110 U. S., 619).

In the Texas and Pacific case the court, speaking through Mr. Justice Shiras, said: "In fact, the second section of our act was modeled upon section 90 of the English 'railway clauses consolidation act' of 1845, known as the 'equality clause,' * * *." (Ib., 222.)

And in the Baltimore and Ohio case, Mr. Justice Brown, who delivered the opinion of the court, in speaking of the English acts, said: "These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of 'undue preference' it may be presumed that Con-

gress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute." (Ib., 284.)

The language of said section 90, so far as material here, is as follows:

Provided, That all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.

For several years after the equality clause was enacted there was conflict concerning its construction in the decisions of the different English courts, but after an exhaustive review of former cases an authoritative conclusion was finally announced in the case of *Great Western R. Co. v. Sutton, L. R.* (4 H. L., 226). The conclusion reached was that, as used in the English acts, the words "same description" and "like description" exhaust themselves upon the traffic, and the words "like circumstances" exhaust themselves upon the route, expense, and risk of carriage, and that none of those phrases can be extended to the

personal qualities of the party who makes the shipment. (Ib. 239, 247, 260.)

Based upon the fact that in the Sutton case there was some evidence tending to show that the carrier allowed certain shippers to ship at the lower rate packages containing parcels of diverse ownership while it contemporaneously exacted the higher rate upon similar shipments of the forwarding agent who was complainant in that case, it is claimed in the minority report of the chairman of the Commission (Record, p. 34), that the Sutton case is not an authority in support of our contention. But an examination of the decision will show that what the English court did was to construe section 90 of the English act and hold that a discrimination in rates between the forwarding agent and another shipper could not be lawfully based upon any fact or circumstance which occurred either before the traffic was tendered to the carrier for transportation at point of origin or after it was delivered by the carrier to the consignee at point of destination. Any doubt in this regard has been removed by subsequent decisions of the English courts. In this connection we call attention to the following cases:

Evershed v. London & Northwestern Ry. Co.
(3 App. Ca., 1029), *Denaby Main Colliery Co.*
v. Manchester, Sheffield & Lincolnshire Ry. Co.
(11 App. Ca., 97).

In the Evershed case, Evershed and two other parties operated breweries located at Burton, which town was served by the lines of railway of three car-

riers. None of the breweries was directly connected with any of the lines of railway, except that the breweries of such two other parties were connected by sidings with the line of the Midland Railway Company; and by reason of this difference in facilities the cost in time and labor of transferring goods to the line of the Midland Company was less where the transfer was from the breweries of such two other parties than where it was from the brewery of Evershed. The latter had to pay a cartage rate for the transfer, but to the brewers who had siding connections the Midland Company made no charge for cartage, and that company also allowed them a rebate of 9d. per ton from the carriage rate of the goods, or what was known as the "station to station" rate.

For the purpose of obtaining a share of their business, the London and Northwestern Railway Company granted to the brewers who had such sidetrack connections with the Midland Railway Company free cartage and a rebate of 9d. per ton, and to that extent discriminated against Evershed, to whom it did not grant free cartage or any rebate.

Under these circumstances the court held that the discrimination constituted a violation of section 90 of the English act.

In the Denaby Main Colliery Company the defendant carrier was engaged in the transportation of coal from the South Yorkshire field to Grimsby, upon the seacoast, and the plaintiff was a coal producer and dealer shipping his commodity via the carrier's line of railway between those points. Coal

was transported by the defendant to Grimsby for land sale and also for sea shipment, and the rate open to the public was somewhat greater upon the former class of shipments than upon the latter. One Banister, who was a competitor of the plaintiff at Grimsby, was allowed a reduction from the rate for water shipments in the two following cases:

Upon coal sold by him and shipped from Grimsby by the Hamburg-American steamers he was given a rebate of 8d. per ton. The case showed this was for the purpose of enabling him to sell the coal to that company in competition with other coals.

Upon coal shipped by him to certain ports south of Harwich he was allowed a rebate of 6d. per ton. This was by virtue of a contract that he should provide the vessels and other necessary capital for the purpose of developing a trade in the coal in those towns where previously it had not been sold.

Coal for land sale was delivered by the defendant at Grimsby to the plaintiff and to most other shippers from team tracks in its own yards, but Banister and another party, Josse & Co., had coal yards of their own with storage and unloading facilities, and their coal was delivered in those yards by the defendant. It was found that the defendant could handle coal cheaper where delivery was made to B. and to J. & Co. in their coal yards than where it was delivered to the plaintiff upon the carrier's team track. The former were allowed rebates on all coal delivered into their yards for land sale.

The court held that the rebates allowed Banister on the coal, sold by him and shipped by the Hamburg-American steamers, and on the coal shipped to points south of Harwich, were illegal, for the reason that the facts in consideration of which those concessions were made did not enter into the carriage of the property, and could not, therefore, be used to show a difference in circumstances within the meaning of that term as employed in said section 90, but that, since the cost to the carrier of the service performed by it was less where the coal was delivered to Banister and Josse & Co. in their own yards than where delivery was made to the plaintiff upon the team track of the carrier, the rebate paid on this account was not a violation of that section.

In his opinion in the latter case Lord Blackburn said (p. 120):

I think that it is finally settled by *Great Western Railway Company v. Sutton* and Evershed's case, that if passing over the same portion of the railway (a fact which was not disputed in either of these cases), the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances," and that the circumstances are those relating to the carriage of the goods, not the person of the sender; that the fact that the persons who are charged less are, as in Evershed's case, so situated that they can go by another route, and probably will do so if charged as much as the charge made to the complaining party, is

not a circumstance justifying an unequal charge. Neither is it a difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade.

The decision in the Sutton case was rendered in 1869, while the decisions in the Evershed and Denaby Main Colliery Company cases are dated, respectively, 1878 and 1885.

It is thus apparent that the English courts, in construing section 90 of the English act, do not allow carriers to make differences in rates because of differences in circumstances arising either before the carriers' services begin or after they are terminated, and we think the following cases show that in construing section 2 of the American act this court has made a similar ruling.

Wight v. United States (167 U. S., 512).

Int. Com. Com. v. Alabama Midland Ry. Co.
(168 U. S., 144).

The facts in the Wight case were as follows: One Bruening and certain of his competitors were dealers in beer at Pittsburg and shipped the beer to that point from Cincinnati. The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company and the Baltimore and Ohio Railroad Company were in competition for the traffic and the rate of transportation via the line of railway of either of said carriers was 15 cents per 100 pounds. Mr. Bruening's warehouse was connected by a side track of the Pittsburgh, Cincinnati, Chicago and St. Louis Company with the

main line of that carrier, but was not connected with the Baltimore and Ohio main line, and none of the warehouses of said competitors was connected with either of said lines. If he shipped his beer over the Pittsburgh, Cincinnati, Chicago and St. Louis line no expense for cartage in Pittsburg would be necessary, since the 15-cent rate included delivery at his warehouse on said side track, but if he shipped over the Baltimore and Ohio line he would be obliged to have the beer carted in Pittsburg from the Baltimore and Ohio depot to his warehouse, and the expense of such cartage was $3\frac{1}{2}$ cents per 100 pounds. To offset this difference in circumstances and conditions and secure for transportation a portion of Mr. Bruening's shipments the Baltimore and Ohio paid to Mr. Bruening the $3\frac{1}{2}$ cents per 100 pounds. Neither of the carriers made cartage delivery in Pittsburg, or paid for such delivery, where the beer shipped was owned by and carted to a warehouse of one of said competitors.

Under these circumstances the court held that in making the payment to Mr. Bruening the Baltimore and Ohio Company violated section 2 of the act to regulate commerce. The language of the court in this connection is as follows:

It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage and does not include competition. (Ib., 518.)

In the Alabama Midland case the court held that when passing upon discriminations alleged to be in violation of sections 3 and 4 of the act competition which affected the rates of transportation involved should be considered, and it distinguished this ruling from the ruling in the Wight case as follows (168 U. S., 166):

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of *Wight v. United States* (167 U. S., 512), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily

relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter under consideration.

Section 2 is an arbitrary rule of law and must be applied whenever and wherever the conditions named in that section exist. It does not begin to operate until the traffic is tendered to the carrier for transportation at point of origin, and it ceases to operate as soon as the traffic is delivered by the carrier to the consignee at point of destination. It is affected by differences between different classes of traffic, but not by differences between different individuals. It applies only while the transportation services are being performed. It can not be used to regulate business done either before the transportation services begin or after they are completed, and its application can not be made to depend upon the effect such application may have upon that business. Such matters simply tend to prove either the wisdom or folly of enacting such a law, but those are matters exclusively within the jurisdiction of the federal

legislative authority. The presumption of law is that they were given due consideration by that authority, and the conclusion reached, as manifested by the law enacted, is not open to review by any other authority.

In the minority report above mentioned it is contended that in the following cases this court held, in substance, that in construing said section 2 circumstances arising either before the traffic was tendered to the carrier for transportation at point of origin or after it was delivered by the carrier to the consignee at point of destination might be considered:

Int. Com. Com. v. Baltimore & O. R. Co. (145 U. S., 263).

Texas & P. R. Co. v. Int. Com. Com. (162 U. S., 197).

In the Baltimore and Ohio case the court simply applied the wholesale and retail principle and held that where one transportation service as compared with another is less expensive to a carrier, that fact may render substantially dissimilar the circumstances and conditions and justify the carrier in accepting a charge for the former service which is less than the charge contemporaneously exacted by it for the latter service. (Ib., 281-282.) This ruling is directly in line with the ruling applied by the English courts in similar cases, as is shown by the decision in the Baltimore and Ohio case, and in entire harmony with the position taken by us in this case. Instead of being in conflict with the propositions advanced by us, the decision in the Baltimore and

Ohio case, as will be pointed out hereinafter, is directly opposed to the contentions of the appellees.

In the Texas and Pacific case the rates compared were: A local rate applied to transportation from New Orleans to San Francisco, and a through rate applied to transportation from London, via New Orleans, to San Francisco. Since the point of origin pertaining to one transportation service was different from that pertaining to the other, of course the provisions of section 2 could not be and were not applied.

IV.

The Circuit Court erred in holding that a party who is rightfully in possession of personal property and clothed by the beneficial owners thereof with authority to ship it in his own name is not a person within the meaning of section 2 of the act to regulate commerce.

In construing said section 2 this court has said:

It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. (*Wight v. United States*, 167 U. S., 512, 518.)

In *United States v. Milwaukee Refrigerator Transit Co. et al.* (145 Fed., 1007), the facts, so far as material here, were: The refrigerator company obtained from the Pabst Brewing Company and other owners of goods intended for interstate and foreign transportation the exclusive right to route their shipments to

all competitive points and then withheld or gave the business according to the railroad companies' resistance or submission to the threat of diverting the traffic unless a tenth or an eighth of the freight moneys were paid to it. Under these circumstances the court held that the refrigerator company was the shipper of the goods. The language of the court in this connection is as follows:

Control of the traffic is as absolute in the refrigerator company as if it were owner, and in numerous transactions the owner is not the shipper. And if an owner, having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper. (Ib., 1012.)

In that case the refrigerator company and other parties, including certain railroad companies, were prosecuted under the act of February 19, 1903, commonly known as the Elkins Act, on account of rebates paid by the railroad companies to the refrigerator company. The first section of the Elkins Act, so far as material here, reads as follows:

It shall be unlawful for any person, persons, or corporation * * * to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce * * * whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier.

It will be seen that the parties against whom the prohibition contained in the section referred to operates are described as "any person, persons, or corporation," while the corresponding terms used in said section 2 are "person or persons;" but the fact that the word "corporation" used in section 1 of the Elkins Act is not included in section 2 of the act to regulate commerce is a matter of no consequence whatever.

In section 1 of the Revised Statutes of the United States it is provided that the word "person" may extend and be applied to partnerships and corporations, and that such application has been made by this court and other Federal courts in many instances is a matter of such common knowledge that a citation of authorities, in addition to those above referred to, does not appear to be necessary.

In this case the appellees concede, at least they do not deny, that where a carload shipment is tendered for transportation to a carrier by a forwarding agent or some other party, and neither such shipper nor the consignee of the shipment is the owner of all the traffic in the car, the shipper has full dominion over the traffic for transportation purposes and is properly clothed with authority to ship same in his own name.

If this court should hold that section 2 applies only where either the consignor or the consignee is the actual owner of all the goods included in the shipment, it is evident that carriers would be free to practice much discrimination which could otherwise be prevented. If such holding were made it is apparent that the application of section 2 would depend, not

upon the language used by the Congress, but upon the will of the carrier to whom the shipment might be tendered for transportation; because, no one contends that it is unlawful for a carrier, in the absence of regulations made by it to the contrary, to apply a carload rate to the transportation of a carload shipment of traffic, where diversity of ownership exists. It is simply contended that the Commission can not compel the application, even though serious and harmful discrimination is certain to result if such application is not made. In his dissenting opinion, the chairman of the Commission said:

The allowance of carload rates on combined less-than-carload shipments of diverse ownership, although it can not be compelled, is nevertheless not unlawful. (Rec., 49.)

Many other evil consequences of the application contended for by the appellees might be pointed out, but as we will have occasion under Point V to recur to the question of ownership we will not further discuss that matter here.

V.

Whether treated as a matter of law or fact the transportation services are like and contemporaneous and performed by the carrier under substantially similar circumstances and conditions.

It will be observed that the prohibition of section 2 applies where the different shipments are composed of a like kind of traffic and the transportation services are like and contemporaneous and performed by the carrier under substantially similar circumstances and conditions.

It is conceded that in each instance the different shipments comprise the same classes of goods and are contemporaneously transported from the same point of origin, over the same line, in the same direction, to the same destination. It is therefore apparent that the conditions named in section 2 exist, and that the discrimination under consideration is unlawful, unless it can be said that the different transportation services are performed by the carrier under circumstances and conditions which are substantially dissimilar. And whether or not such dissimilarity exists is a question, not of law, but of fact.

To the same effect see *Texas & Pacific Ry. Co. v. Interstate Commerce Commission* (162 U. S., 197, 238) and *Great Western Ry. Co. v. Sutton* (L. R., 4, H. L., 226, 242, 245, 248-249). But whether treated as a matter of law or a question of fact, the evidence in the record establishes beyond doubt that the circumstances and conditions pertaining to the different shipments are substantially similar.

Counsel for the carriers did not contend in the Circuit Court, and presumably will not contend in this court, that there is substantial dissimilarity, if inquiry must be confined to services performed by the carrier and the character of the traffic transported, and it is evident that such contention could not consistently be made.

The only difference pointed out is the possibility of a greater number of suits being instituted against the carrier where diversity of ownership exists. It is said that in case of insolvency a beneficial owner, al-

though not the actual shipper, may stop the goods in transit, and that if the goods are lost or injured while in the possession of the carrier each of the actual owners may institute a suit for the recovery of damages.

In *United States v. Milwaukee Refrigerator Transit Co. et al., supra*, the court said:

If an owner, having full dominion in all respects, conveys to another the dominion for transportation purposes, that other in all dealings respecting transportation should be deemed the owner and shipper. (Ib., 1012.)

It is apparent that if the carrier thinks there is greater liability where diversity of ownership exists, it may escape such liability to a large extent at least by the establishment and enforcement of regulations pertaining to method of procedure where suit is instituted; but, in any event, the difference in risk between the different shipments, assumed by the carrier, would be infinitesimal.

Evidence concerning stoppage in transit is as follows:

Mr. SLUSSER. How many cars does your company ship, or did it, in the last year?

Mr. BUNGE. We have shipped so far 1,100 cars this year.

Mr. SLUSSER. Have you ever known of a car or has any car you have shipped ever been stopped in transit by any creditor of any of the various owners of the assembled goods?

Mr. BUNGE. No, sir. I might add that in my experience as manager of the forwarding

company we have handled, since the date of our beginning to the present time, probably a few more than 8,000 cars, and I only know of one case where a car was stopped in transit during all that time, and I only know of one suit that was brought by an individual who was interested in any one of those cars against the railroad company.

The CHAIRMAN. The fact that out of 8,000 carloads only one suit has arisen is the important fact, and that you have already. What that suit was about is not of the slightest consequence.

Cross-examination:

Mr. WILSON. I understood you to say that of 8,000 carloads one car was stopped in transit.

Mr. BUNGE. Yes.

Mr. WILSON. Where the purchaser had become insolvent?

Mr. BUNGE. Some creditor stopped it.

Mr. WILSON. How many cases of stoppage in transit do you suppose they [there] are on railroads generally, with respect to general shipments, on account of the insolvency of the shipper?

Mr. BUNGE. I can say from my twelve years' experience as a freight agent for various railroads I only know of one, and that happened a good many years ago.

Mr. WILSON. I do not believe we have had one on the Baltimore and Ohio, and we have been shipping thousands of carloads every year. I do not believe we have had one case of stoppage in transit on account of the insolvency of the shipper. (Record, 267.)

We thus see that, although, in theory, there may be a difference, in reality that difference is insignificant. The Mr. Bunge who testified was president and general manager of the American Forwarding Company, and Mr. Wilson, who cross-examined him, was general solicitor of the Baltimore and Ohio Railroad Company.

According to reports made to the Commission under oath by the appellees, their total loss and damage accounts for the fiscal years ending June 30, 1903, to 1907, inclusive, were percentages of their total freight earnings as follows (Record, 87):

Name of road.	Year ending June 30—	Ratio of los- s and damage to total freight earnings.
		Per cent.
Delaware, Lackawanna and Western R. R. Co.	1907	.0.03
	1906	.06
	1905	.48
	1904	.43
	1903	.40
Wabash Railroad Co.	1907	2.16
	1906	1.78
	1905	2.03
	1904	1.29
	1903	.97
New York, Chicago and St. Louis R. R. Co.	1907	1.57
	1906	.95
	1905	.98
	1904	1.06
	1903	.68
Baltimore and Ohio R. R. Co.	1907	1.13
	1906	1.06
	1905	1.33
	1904	1.26
	1903	.99

The above percentages cover the following items:

Charges for loss, damage, delays, or destruction of freight, parcels, express matter, baggage, and other property intrusted for transporta-

tion (including live stock received for shipment), and all expenses directly incident thereto; cost of repacking and boxing damaged freight and baggage, feed for delayed stock (except when delayed in wrecks), etc.; wages and expenses of employees engaged either as adjusters or otherwise, and payments for the detection of thieves; charges for damages to or destruction of crops, buildings, lands, fences, vehicles, or any property other than that intrusted for transportation, whether occasioned by fire, collision, overflow, or otherwise; also expenditures for account of cattle and other live stock killed or injured by locomotives or trains while crossing or trespassing on the right of way, removing and burying the same; also services and expenses of employees or others while engaged as witnesses in case of suits. (Record, 88.)

If the items not properly chargeable to the transportation of freight articles were excluded the above percentages would be very much reduced, and where the percentage based upon the entire loss and damage is a mere bagatelle, it is evident that the difference in risk incident to the difference in ownership referred to would be so small as to be practically unnoticeable.

The appellees' other objections to enforcement of the Commission's order are all based upon circumstances arising either before the traffic is tendered to the carriers for transportation by the shippers at points of origin or after it is delivered by the carriers to the consignees at points of destination. Their contention is, in effect, that they may so

conduct the business of transportation as to control other business; that they may establish and enforce rates of transportation and rules and regulations pertaining thereto which will practically enable them to dictate concerning the parties who shall engage in the latter business and the places where that business shall be done. The appellees say that if they are compelled to keep their lines of railway open on equal terms to all shippers, and are not permitted to exact from a party who ships a carload of goods he doesn't own a rate of transportation greater than the rate they contemporaneously accord to another party who ships a carload of goods he does own, discriminations between actual owners of goods will be possible, but they fail to explain to the court that unless the operation of said note to Rule 5-B and said Rule 15-E is restrained, as provided for in the Commission's order, greater and much more harmful discriminations between actual owners of goods transported by the appellees and other carriers will inevitably result.

Carriers who operate lines of railway in the Official Classification territory, including the appellees, voluntarily establish, maintain, and enforce rules and regulations whereby they discriminate between carload and less-than-carload shippers and exact for the transportation of a certain kind of traffic in less-than-carload lots rates much greater than those they apply to the same character of traffic shipped in carload quantities, and they are able to and do justify this discrimination by showing that the former

service as compared with the latter is more expensive to them. Generally speaking, carload shipments are loaded by the shippers and unloaded by the consignees, while less-than-carload shipments are loaded and unloaded by the carriers, and the carriers must furnish storage facilities both at points of origin and at points of destination for the latter shipments, but are not required to do so for the former. It is also true that the tonnage included in one car is greater and the risk of damage to the traffic less where shipments are made in carload lots. A further difference in cost to the carriers arises from the fact that cars containing less-than-carload traffic must usually be stopped at many points en route for loading and unloading purposes, while carload shipments pass from points of origin to points of destination without break of bulk. These and other similar circumstances are shown by the carriers to justify discriminations made by them between carload shippers on the one hand and less-than-carload shippers on the other.

But if, after providing rates for carload shipments which are, on an average, 50 per cent less than those applied to the transportation of less-than-carload shipments, the carriers may in each instance confine the right to use the lower rates to cases where all the traffic in the car is owned by one party, it is evident that thereby monopoly will be facilitated and parties of comparatively small means be subjected to the will of their more powerful competitors. It is apparent that the party who is compelled to pay the higher less-than-carload rates can not compete suc-

cessfully with the party who is accorded the lower carload rates, and in this connection what is true between different persons, firms, and corporations is equally true as between different localities. Towns whose business concerns had at their disposal comparatively large amounts of capital and could therefore do business on a large scale and ship in carload lots would have an advantage over towns whose business men were comparatively poor and therefore restricted to a small business and compelled to ship in less-than-carload quantities.

However, the discrimination which results from the rule permitting the application of carload rates to the transportation of a certain article when shipped in carload lots but requires the application of greater rates to the transportation of the same article when shipped in less-than-carload quantities is much intensified by another rule of the carriers who operate lines of railway in the Official territory including the appellees, whereby the carriers permit shippers to combine in one car and ship at a carload rate articles of different kinds classified and rated alike and articles of different kinds classified and rated differently. (Record, 30.)

Of course, the greater the opportunity afforded by the carriers for obtaining carload rates the more important the discrimination practiced by the carriers as between carload shippers on the one hand and less-than-carload shippers on the other hand will be, and we therefore quote from the dissenting

opinion of the chairman of the Commission as follows (Record, p. 30):

A recent careful and authoritative examination of the several classifications shows that in the Southern Classification there are 3,503 less than carload and only 773 carload ratings, the carload ratings being 22.1 per cent of the less than carload; in the Western Classification there are 5,729 less than carload and only 1,690 carload ratings, the carload ratings being 29.8 per cent of the less than carload; while in the Official Classification there are 5,852 less than carload ratings and 4,235 carload ratings, the carload ratings being 72.4 per cent of the less than carload.

The figures referred to were included in the dissenting opinion in connection with an effort made to show that the carriers who operate lines of railway in the Official territory should be permitted to enforce the provisions of said note to Rule 5-B and said Rule 15-E, but we respectfully submit that they prove instead exactly the contrary. If where only 5,852 of the higher less-than-carload rates exist the carriers have voluntarily provided a means whereby, in 4,235 cases, the lower carload rates can be obtained, it is evident that the discrimination between shippers caused by the application of carload rates on the one hand and less-than-carload rates on the other will be greater or less in proportion to the difficulty or ease with which the means thus provided can be employed; and since the carriers have established and are now enforcing the note and rule referred to

simply for the purpose of rendering it difficult for shippers to obtain carload rates, and because the less-than-carload rates are, on an average, 50 per cent greater than the carload rates, it necessarily follows that the enforcement of the note and rule would create, while their elimination from the tariffs and classifications of the appellees and other carriers would at least mitigate, serious and very harmful discriminations.

The undisputed evidence is that carload rates are applied on consolidated shipments all over Europe, including Great Britain, and in all portions of the United States, except the Official territory, regardless of the ownership of the traffic included in the shipments. Indeed it has been shown that the appellees and other carriers will apply carload rates regardless of ownership if the shipments are transported from or to points in the Official territory to or from points in foreign countries. (Record, pp. 152-153, 212.) It is therefore apparent that unless enforcement of the note and rule in question is prohibited discriminations will exist not only between Official territory and other parts of the United States but also between parties engaged in different classes of business in the Official territory.

The appellees call the forwarding agent a freight scalper and say that unless his business is destroyed discriminations between shippers, which the framers of the act to regulate commerce intended to prevent, will exist. But it will be seen that the operations of the forwarding agent do not increase discriminations

between shippers; on the contrary, they reduce very materially the force of discriminations provided for by voluntary action on the part of the appellees and other carriers.

However, the evidence in this case shows that only a small portion of the traffic consolidated in carloads and shipped at carload rates regardless of ownership is handled by forwarding agents, properly so called; and the evidence also establishes beyond a doubt that unless business men of small means are permitted to club together and through the agency of one of their own number or some other agency consolidate their traffic in carloads and ship it at carload rates they will be compelled to sell to and purchase of their more powerful competitors at prices dictated by the latter. (Record, pp. 61-62, 252-253, 264.)

It is apparent that large dealers who are able to and do own the goods shipped may employ agents either as shippers or consignees and still obtain the lower carload rates, and under these circumstances it is plain that if small dealers are not permitted to co-operate and use agents in like manner and with the same effect the latter will simply be at the mercy of the former.

Theoretically at least the discriminations made by carriers between carload and less-than-carload shippers are based upon the difference in cost to the carriers of the services performed by them in transporting the different shipments, and if the discriminations made are in fact so great that if the carriers are compelled to treat all shippers alike they will thereby

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lose revenue to which they are fairly entitled, the remedy is in the hands of and entirely under the control of the carriers, and may be applied by them regardless of the terms of the order in question. They have a perfect right to observe how business affairs outside of transportation matters are conducted and use the knowledge thus obtained for their own advantage when they apportion and fix their transportation rates. But when the rates are established they must be applied indiscriminately, and if a carrier in an effort to serve its own interests thinks best to and does fix a rate per hundred pounds for the transportation of a certain class of traffic which is less where the traffic is shipped in carload lots than where shipment is made in less-than-carload quantities the carrier may not, for the purpose of preventing a small dealer from doing business in a certain market or even for the purpose of protecting a jobber by preventing a forwarding agent from securing business the jobber might otherwise obtain, accord to some and deny to others the privilege of using the carload rate. Nor can carriers make such a discrimination for the purpose of securing to themselves a monopoly of the business of preparing traffic for transportation. To say that they, as public servants, may create conditions which make the business of assembling goods in carload lots very profitable and then restrict to themselves and those they see fit to favor the right to participate in profits thus obtained is equivalent to saying that they may take advantage of their own wrong.

If the carriers may not discriminate between different carload shippers and apply a rate where all the traffic in the car is owned by one party which is lower than the rate exacted by them where diversity of ownership exists, they will probably exercise greater care than they would otherwise in fixing the disparities between carload and less-than-carload rates; that is to say, they will adjust their rates so as to correspond with the transportation services they perform instead of for the purpose of controlling matters outside of the business of transportation, knowing that shippers will naturally undertake to present their traffic for transportation in the manner which will entitle them to the most favorable rates offered by the carriers.

But a controlling reason why carriers should not be permitted to make differences in rates because of differences in ownership of the traffic transported by them is that to determine in each instance the ownership of traffic shipped would be impracticable if not impossible. In this connection the language of Commissioner Lane, in delivering the opinion of the Commission in the California Commercial Association case, (*supra*, p. 25,) is pertinent. The impracticability of making ownership the test of making carload shipments at carload rates is, we think, so apparent that extended argument in this connection is not necessary. It is evident that if such a test were applied innumerable and very harmful discriminations would result because of differences in the requirements of different carriers and different agents of the same carrier con-

cerning proof of ownership. We feel certain the application of such a test would be followed by false representations, made by shippers, and by transfers of legal titles made simply and solely for the purpose of enabling the transferees to obtain from the carriers the lower carload rates.

The record proves conclusively that the Commission considered fully the question of ownership and examined carefully all the appellees' contentions concerning differences in circumstances and conditions resulting from diversity of ownership on the one hand and single ownership on the other, but the record also shows that the Commission was of the opinion that dissimilarity could not be established by circumstances, whether connected with ownership or not, arising either before the traffic was offered to the carrier for transportation by the shipper at point of origin or after it was delivered by the carrier to the consignee at point of destination, and it is contended that for this reason the order of the Commission must be held to be invalid.

We have shown that the opinion thus expressed by the Commission is directly in line with rulings of the English courts in analogous cases and is also in line with the rulings of this court in the Wight and Alabama Midland cases hereinbefore referred to. But notwithstanding the plain and unambiguous language used by the court in the latter two cases, it is insisted that some doubt exists concerning the court's meaning, and that in the case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad*

Company (145 U. S., 263), this court used language indicating a construction of section 2 which is in conflict with the interpretation now contended for by us.

The facts in the latter case so far as material here were as follows: The Baltimore and Ohio Railroad Company established rates which were less for each passenger carried when ten or more traveled together than the rates contemporaneously exacted by it for the transportation of a single passenger traveling between the same points. The Commission held that this was an unlawful discrimination against the party who was so circumstanced that he could not combine with nine others and participate in the lower rate, and gave to the parties who were so situated that they could travel together and thus obtain the lower rate undue and unreasonable preference; but the court in disapproving the ruling of the Commission said (p. 280):

These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even

enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to everyone doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who can not be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. * * * If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In other words, this court affirmed the right of the carrier to apply to its business the wholesale and retail principle, but intimated that after establishing rates which were less per unit where several units were included in the contract of transportation than where only one unit was included in the contract of transportation, it would be unlawful for the carrier to confine the lower rates to certain individuals or classes of individuals and compel others to pay greater rates, although the services performed by the carrier were

substantially the same in both cases; and the court added that the discrimination resulting from such application of the wholesale and retail principle would not be rendered unjust by reason of the fact that some of the parties, because of their locations, were not able to comply with the conditions upon which the lower rates were accorded, if the conditions themselves were not so onerous as to be inherently unreasonable.

It will thus be seen that the principle contended for by the carriers in the Baltimore and Ohio case and upheld by this court was exactly the same as the principle applied by the Commission in this case and now contended for by the Government. Notwithstanding the fact that the appellees and other carriers have established rates for the transportation of property which are much less where shipment is made in carload lots than where shipment is made in less quantities, they contend that the order of the Commission which simply requires them to apply indiscriminately the carload rate upon all shipments presented to them for transportation in carload lots is invalid, because if obedience thereto is enforced it will be possible for some, but impossible for others, of those who now have to pay the greater less-than-carload rates to obtain the lower carload rates.

We submit therefore that, instead of the ruling of this court in the Baltimore and Ohio case being opposed to the position here taken, it is in absolute conflict with the contentions of the appellees.

CONCLUSION.

To repeat:

First. The Commission had power to make the order complained of.

Second. The Circuit Court erred in not dismissing the complaint for the reason that it fails to state a cause of action.

Third. In determining whether transportation services were like and contemporaneous and performed under substantially similar circumstances and conditions, it is not proper to consider how and by whom the traffic was handled before tender to the carrier for transportation at point of origin, or how and by whom it was handled after delivery by the carrier to the consignee at point of destination.

Fourth. One who is rightfully in possession of personal property, with authority to ship it in his own name, is a person within the meaning of section 2 of the act to regulate commerce.

Fifth. A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates.

For these reasons it is submitted the decree of the Circuit Court for the Southern District of New York should be reversed.

WADE H. ELLIS,

Assistant to the Attorney-General.

P. J. FARRELL,

EDWIN P. GROSVENOR,

Special Assistants to the Attorney-General.

Supreme Court of the United States

October Term, 1937

No. 295

INTERSTATE COMMERCE COMMISSION, THE AMERICAN
FORWARDING COMPANY, ET AL.,

v. 44 U.S. 2d

THE DELAWARE, LACKAWANNA AND WILKES-BarRE
RAILROAD COMPANY, THE WARREN & LEHIGH
COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS
RAILROAD COMPANY and THE MICHIGAN
AND OHIO RAILROAD COMPANY,

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

WILLIAM J. DODD

WALTER E. COOPER

CHARLES E. HARRIS

JOHN F. KELLY

ROBERT L. MCNAUL

JOHN P. O'LEARY

JOHN T. O'LEARY

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Supreme Court of the United States.

INTERSTATE COMMERCE COMMISSION,
THE AMERICAN FORWARDING COMPANY,
ET AL.,

Appellants,

AGAINST

THE DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
THE WABASH RAILROAD COMPANY,
THE NEW YORK, CHICAGO AND
ST. LOUIS RAILROAD COMPANY,
and THE BALTIMORE AND OHIO
RAILROAD COMPANY,

Appellees.

October Term, 1909.
No. 594.

Statement.

This is an appeal from a final decree of the Circuit Court of the United States for the Southern District of New York annulling an order of the Interstate Commerce Commission (hereinafter called the "Commission").

GENERAL OUTLINE OF THE CASE.

The Commission's order was made on complaint of the Export Shipping Company, whose business it was to consolidate and forward in carload lots over the lines of the railroad companies small consignments of various shippers,

the Shipping Company giving its own bill of lading to each shipper and taking from the railroad company a single bill of lading for each carload.

The Shipping Company's object was to procure from the railroad companies transportation of all such shipments at the carload rate, which was lower than the less than carload rate applicable to the separate smaller consignments. This object, if accomplished, would enable the Shipping Company to charge each individual shipper a less rate than such shipper would have had to pay according to the published tariff rates of the railroad company, and at the same time would enable the Shipping Company to retain as its own profit for such intervention in the transportation service the difference between the rate collected by it from the shipper and the carload rate paid by it to the railroad company.

The rules in the freight classification of the railroad companies prohibited this practice and provided, in effect, that carload rates should not be applicable to such consolidated carload lots tendered by forwarding agents, but that each separate consignment contained in such carload should be charged the less than carload rate applicable to such separate consignment under the published tariffs of the railroad companies.

The Shipping Company contended that the transportation by the railroad company of a carload so consolidated was the same from a physical standpoint as the transportation of a carload belonging to a single consignor or consignee, and that, therefore, Section 2 of the Act to Regulate Commerce prohibited any difference in the rates charged by the railroad companies.

The Railroad Companies denied that the classification rules referred to violated Section 2, for the reasons that the physical aspects of transportation were not the same for the two services and that the section permitted the consideration of other matters which fairly warranted the resulting

difference in rates. Among the reasons asserted by the Railroad Companies in support of their position were the following: (*a*) that the necessary consequence of such an intrusion of forwarding agents into the transportation business was to cause longer delays in the loading of cars, greater complication in the liability of the carrier, and to afford wider opportunity and temptation for fraudulent billing by irresponsible persons; (*b*) that the railroad company had the right to apply its carload rates so as to avoid the destruction of its natural less than carload business, especially as the railroad company would still be required to maintain the necessary facilities for less than carload business, even though that business should be appropriated largely by the intervening agency of the forwarding company; (*c*) that it would be contrary to the policy of the law to permit the injection into the transportation situation of such a foreign and unregulated element as the forwarding agents, thereby making the rates of individual shippers a matter of bargain in each case and destroying stability and publicity of rates which it was the purpose of the law to establish.

The railroad companies also claimed that Section 2 was intended to protect the shipping public in the ordinary sense of that term, and did not extend to the protection and promotion of the interests of such an agency as a forwarding company whose sole profit arose from making inroads upon the legitimate traffic of the railroad companies.

A majority of the Commission in a brief opinion (Trans., p. 25) held that Section 2 required the same service for forwarding agents as for the shipping public, ignored the physical differences between the two services alleged by the railroad companies, and held as a matter of law that Section 2 was an arbitrary rule prohibiting, with respect to rates from the same point of shipment to the same destination, the consideration of any differentiating

element except such as might relate to the character of the goods or the length of the haul, and therefore declared the rules complained of to be unlawful and ordered them to be stricken from the freight classification.

Commissioners KNAPP and HARLAN dissented (Trans., pp. 27, 63).

The railroad companies brought this suit against the Commission and the Export Shipping Company to enjoin the enforcement of the Commission's order, and it was declared unlawful and its enforcement enjoined by the Circuit Court. This appeal is by the Commission and by the American Forwarding Company and certain other forwarding companies which were permitted to intervene in the Circuit Court in support of the Commission's position.

DETAILED STATEMENT OF THE FACTS AND PROCEEDINGS.

We now proceed to a more detailed statement of the facts and proceedings.

THE CLASSIFICATION RULES WHICH THE COMMISSION ORDERED CANCELLED.

The rules in question are contained in the Official Freight Classification which prevails in the territory north of the Potomac and Ohio rivers and east of the Mississippi river and are as follows:

Rule 5-B: "In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor, it will be subject to the Car Service Rules and charges of the forwarding railroad (see Note)."

Note: "Rule 5-B will apply only when the consignor or consignee is the actual owner of the property."

Rule 15-E: "Shipments of property combined into packages by forwarding agents claiming to act as consignors, will only be accepted when the names of individual consignors and final consignees as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be way-billed as separate shipments and freight charged accordingly (see Note)."

Note: "The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of L. C. L. shipments of articles from several consignors at point of origin."

(Trans., pp. 6, 25).

THE DECISION OF THE COMMISSION AND THE DISSENTING OPINIONS.

The majority of the Commission delivered a very brief opinion, containing no findings or comments as to the facts, and no discussion of the law, but stating that "These cases are governed in all respects by the decision just rendered in the case of California Commercial Association vs. Wells, Fargo & Co." and that

"Our conclusions are as follows:

"The note to Rule 5-B and Rule 15-E of the Official Classification, as quoted above, are unjustly discriminatory, unjust, unfair, and unreasonable in this: That they provide that defendants shall collect a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce than defendants collect from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

"A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates" (Transcript, p. 27).

Chairman Knapp filed in the Export Shipping Case a dissenting opinion in which Commissioner Harlan con-

curred (Trans., p. 27), and Commissioner Harlan filed in the Wells Fargo case a dissenting opinion, in which Chairman Knapp concurred (Trans., p. 63).

THE EVIDENCE BEFORE THE COMMISSION AND THE EVIDENCE BEFORE THE COURT.

All the evidence taken upon the hearing before the Commission is a part of the record in this case and will be found in the transcript beginning at page 131 and ending at page 298.

With the exception of the evidence of Mr. Bailey, President of the complainant forwarding company and of representatives of the Railroad Companies which were respondents, the evidence consisted of testimony on behalf of the interveners who are engaged in consolidating and forwarding *in territory west of Chicago and the Mississippi River* (known as Western Classification Territory), the commodities of furniture, household goods, machinery, implements and buggies. The testimony upon behalf of these intervening companies begins at page 179 of the transcript and extends to page 286 of the transcript.

In the court below the application for temporary injunction was made and heard upon the record of the evidence before the Commission and upon the affidavits of Mr. Jenney and Mr. Caldwell, Vice-Presidents of the Delaware, Lackawanna and Western Railroad Company. No affidavits were filed on behalf of the defendants. The case was submitted for final decree upon the same record, so that there was no denial of the statements in the affidavits of Mr. Jenney and Mr. Caldwell, except so far as there might be in the record of the hearing before the Commission testimony inconsistent with such statements.

THE CHARACTER OF THE BUSINESS OF THE FORWARDING AGENT.

The following statement of the character of the business of the forwarding agent is contained in the affidavit of Burns D. Caldwell, Vice-President of the D. L. & W. R. Co., and is not contradicted :

"The forwarding agent assembles, or causes to be assembled, at a given shipping point several less than carload shipments of freight owned by different persons, firms or corporations to an amount sufficient to make a carload. It orders a car from the railroad company and loads, or causes to be loaded, into the car the said less than carload shipments. It takes out one bill of lading covering the goods, shewing them to be shipped in the name of one consignor, who may be the forwarding agent or one of the several owners, to one consignee. It may receive the goods at point of destination and distribute them to the different consignees entitled thereto, or the several consignees may themselves call for the goods at the railroad station. The forwarding agent seeks to pay the railroad company the carload rate that would apply to a carload of such goods as it may ship if said goods were all owned by one consignor or one consignee. If successful in securing this carload rate, it then divides with the several less than carload shippers the difference between the less than carload and the carload rates applicable to their shipments. The less than carload shippers thereby have their goods transported at rates lower than the published rates of the railroad companies applicable to such shipments, and the forwarding agent makes a substantial profit out of the transaction." (Trans., p. 125).

Mr. F. G. Bailey, President of the Export Shipping Company, the complainant before the Commission, admitted that the Railroad Companies had properly characterized the business of his company (Trans., pp. 133, 134). He also explained (Trans., p. 138) that his company as forwarding agent gave each of its patrons a bill of lading, that these

bills of lading "are recognized in banking circles," and that "our bills of lading are entirely similar to the fast freight lines."

THEIR BUSINESS IS PRIVATE AND THEIR RATES TO SHIPPERS NEED BE NEITHER PUBLIC NOR UNIFORM.

That the rates obtained by individual shippers from the forwarding companies will be a subject of private contract and may fluctuate widely is evident from the nature of the business of the forwarding agent, and was conceded by Mr. Bailey, as is shown by the following:

COMMISSIONER KNAPP: "My present concern is to ascertain whether we need take any testimony in this case, to see if we have all of the facts for a complete determination of the case."

MR. BAILEY: "We concede all the facts."

COMMISSIONER KNAPP: "Do you concede the facts as stated by Mr. Jenney?"

MR. BAILEY: "That we make up the less than carloads and charge the shipper a proportionate rate of the difference between the carload and less than carload rates."

MR. JENNEY: "Then you concede that you go to various shippers who have less than carload shipments of freight and contract with them as their agents to take that freight for less than the tariff rate of the railroad company on less than carload shipments?"

MR. BAILEY: "Yes."

MR. JENNEY: "And you actually quote a rate to them less than the carload rate?"

MR. BAILEY: "We do" (Trans., p. 135).

Mr. Bailey also testified (Trans., p. 157):

MR. BAILEY: "We have the carloads transported at carload rates, and we make our arrangements with the shipper or the consignee as to the proportion that he shall pay for transporting a particular lot of freight that he occupies in the car."

MR. JENNEY: "Then you ship your car at a carload rate and you divide with the shippers the difference between the carload rate and the less than carload

rate which they would have to pay if they did not ship through you, and in that way you make your money; is that right?"

MR. BAILEY: "We divide it under an agreement between ourselves, yes."

MR. JENNEY: "And, of course, depending upon competitive reasons, Mr. Bailey, one of your customers may ship for less than another."

MR. BAILEY: "It is possible" (Trans., p. 157).

Again, Mr. Bailey testified (Trans., p. 167) :

MR. WILSON: "Have you a standard rate that you quote to the shipper, or how is that?"

MR. BAILEY: "It is fairly standard—it is flexible."

MR. WILSON: "Suppose you had gotten together almost a carload, and you wanted to fill up the balance of the space, would not your rate happen to be favorable then?"

MR. BAILEY: "It might."

MR. WILSON: "Who has the authority to quote the different rates to these various shippers?"

MR. BAILEY: "Our Traffic Manager."

MR. WILSON: "Any limitations on his authority in that regard?"

MR. BAILEY: "No sir."

COMMISSIONER KNAPP: "Your business covers quite a wide range of traffic I infer from what you say?"

MR. BAILEY: "Yes sir."

COMMISSIONER KNAPP: "Machinery and miscellaneous merchandise?"

MR. BAILEY: "Almost everything that is mentioned in the official classification."

Mr. Wood testified as follows (Trans., p. 204) :

THE CHAIRMAN: "Now, if this forwarding agent may come in between the shipper and the carrier, he is subject to no law; he publishes no tariff; he gives no notice of his charges. He may take your traffic at \$1.40, plus 15 cents, and he may charge me \$1.40, plus forty-five, or plus fifty, or he may refuse to take mine at all; is not that so?"

MR. WOOD: "I presume that is so."

Mr. Post, a forwarding agent, testified as follows (Trans., pp. 214 and 222, 223) :

"The privilege sought by the forwarding agent of combining shipments of different ownership is entirely distinct from the privilege allowed to individual owners of combining and forwarding at carload rates shipments of different commodities. Generally speaking, where the latter privilege is allowed the former is denied, and *vice versa*. In Western Classification territory there is a distinct prohibition against the combination of two or more articles of single ownership having the same or different carload ratings, for the purpose of obtaining the carload rate, except as such combinations may be specifically authorized in the classification. In like manner there is no general warrant for such mixed carloads in the South, and the specific provisions in the Southern Classification for combined carloads are even more limited in number and extent of mixture than those authorized in the Western Classification. On the other hand, a rule of the Official Classification authorizes the combination by the owner and carriage at carload rates of any two or more articles having the same carload rating, as well as the mixing of articles having different carload ratings, proper details being provided as to rates and minimum weights at which such combined shipments will be carried.

"In this connection it is also to be observed that there is a radical difference in respect to the number of carload and less than carload ratings between the Western and Southern Classifications on the one hand and the Official Classification on the other. A recent careful and authoritative examination of the several classifications shows that in the Southern Classification there are 3,503 less than carload and only 773 carload ratings, the carload ratings being 22.1 per cent. of the less than carload; in the Western Classification there are 5,729 less than carload and only 1,690 carload ratings, the carload ratings being 29.8 per cent. of the less than carload; while in the Official Classification there are 5,852 less than carload ratings and 4,235 carload ratings, the carload ratings being 72.4 per cent. of the less than carload.

"In the Southern Classification 32.92 per cent. of the less than carload ratings are in the fifth, sixth, and lettered classes; in Western Classification there are no less than carload ratings below fourth class, and in the Official Classification only 1.25 per cent. of the less than carload ratings are below fourth class. Of course, there are certain

articles, such as coal, upon which no less than carload rate is named and certain other articles upon which no carload rate is made, so that it does not follow that each article having a carload rating has also a less than carload rating, or *vice versa*; but, assuming that the articles of one class are offset by those of the other, it would follow that in Southern territory the forwarding agent could combine for the purpose of a carload rating only 22 per cent. of the articles having less than carload ratings; in Western territory only 29 per cent. of such articles; while in Official Classification territory 72 per cent. of such articles could be combined.

"The natural reflex of these fundamental differences regarding the combination of shipments of single ownership is found in the rules respecting the combination of less than carload shipments of different owners. Where the former privilege is allowed the latter is denied. This result is perhaps to be expected when considered from the standpoint of the carriers' revenue. In Official Classification territory, where the individual shipper can combine into mixed carloads and forward at carload rates practically all of his products, if they were added the privilege of the forwarding agent to combine and forward at carload rates the small shipments of different owners, it might happen that a large proportion of the traffic now carried at less than carload rates would be transported at carload rates and the carriers' gross revenue be reduced accordingly. On the other hand, in Western and Southern territory, where no such general privilege in respect of mixed carloads exists, and the forwarding agent is confined to the combination of a limited number of the same articles, such as two or more shipments of furniture or machinery, the effect upon the carriers' revenue is relatively unimportant" (Trans., pp. 29-31).

THE CONSEQUENCES TO THE RAILROAD AND TO THE PUBLIC OF THE INVASION OF THE RAILROAD BUSINESS BY THE FORWARDING AGENTS.

At the hearing before the Commission Mr. Caldwell, Vice-President of the Delaware, Lackawanna and Western Railroad Company, testified that the operations of forward-

ing agents in Official Classification Territory would destroy publicity and equality of rates (Trans., p. 173), would enable forwarders to demand commissions from the railroads (Trans., p. 174); and would greatly increase the incentives to fraud on account of the entire irresponsibility of the forwarding agents (Trans., p. 175). He also testified that as a rule with the great mass of shippers carload shipments were loaded promptly so as to incur no demurrage, while it was substantially the rule that in the case of forwarding agents there was such delay in loading carloads as to occasion demurrage charges (Trans., p. 176); and that the legalizing of the action of forwarding agents in official Classification Territory would result in a great many such agencies coming into existence, and that that would produce "a practically chaotic condition with respect to the railroad companies until such time, perhaps, as they may be forced, as already suggested, to withdraw either the less than carload or the carload rates, so as to have only one" (Trans., p. 177).

Mr. Caldwell also testified before the Commission that *one-half, or more than one-half, of the westbound freight traffic on all New York Trunk Lines was less than car-load business* (Trans., p. 288).

With respect to the physical differences in the handling of carloads by forwarding agents as compared with handling carloads for the general shipping public, we quote the following from Mr. Caldwell's affidavit:

"From the limited operation of forwarding agents in the Western and Southern Classification territories, as well as in the other Official Classification territory, however, the conditions attending their shipments and their effect upon the business of the railroads can be observed. It is a fact that in the case of car-load shipments of one ownership demurrage charges rarely accrue at the point of loading. On the other hand, it has been the experience of the railroads that car-load shipments of forwarding agents are generally delayed beyond the free time of forty-eight (48) hours allowed for loading. For this

delay of their equipment the charge of one dollar (\$1.00) per day per car is not compensatory to the railroads. The delay, it has been observed, is due partly to the carting of the goods to the car by the various draymen of the several owners, the division of responsibility and lack of proper direction and management, as well as the natural desire of the forwarding agent to hold the car until it has been filled to its capacity. Illustrations of this tendency to delay may be found in the various shipments of The Export Shipping Company, which were disclosed at the hearing before the Interstate Commerce Commission. On the shipment referred to in The Export Shipping Company's complaint against The Wabash Railroad Company and The Delaware, Lackawanna and Western Railroad Company, five dollars (\$5.00) demurrage accrued at the point of shipment, indicating a detention of the car for seven (7) days for loading. On the shipment referred to in the complaint against the New York, Chicago and St. Louis Railroad Company and The Delaware, Lackawanna and Western Railroad Company five dollars (\$5.00) demurrage accrued, indicating a detention of the car for seven (7) days. On a shipment over The Michigan Southern Railroad, consigned by and to 'E. Goldman & Co.' through the agency of The Export Shipping Company June 5, 1907, eleven dollars (\$11.00) demurrage accrued, indicating a detention of the car for thirteen (13) days. On another shipment over the Michigan Southern, consigned by and to E. Goldman & Co. through the agency of The Export Shipping Company, five dollars (\$5.00) demurrage accrued, indicating a detention of the car for seven (7) days" (Trans., p. 127).

While some of the interveners who were experts in their special and narrowly restricted work in Western Classification Territory insisted that their loading was done promptly, there is no evidence in the record which substantially contradicts Mr. Caldwell's statements with respect to the situation as to traffic generally in Official Classification Territory.

Further characteristics of the business of the forwarding agents are shown by the following quotation from Mr. Caldwell's affidavit:

"Experience with forwarding agents has also disclosed that there is a marked tendency with them to falsely bill and classify freight in order to secure lower rates or minimum weights. This has been discovered in the past by our inspectors, and it appears to be more prevalent in the case of carload shipments of forwarding agents than those of a single ownership. Forwarding agents have been attempting to operate throughout Official Classification territory in violation of rules '5-B and note' and '15-E and note,' and it has only been by constant inspection that they have been detected and made to pay the legal rates.

"By reason of the great freedom allowed within Official Classification territory, in combining for carload shipment, articles of all kinds and description, forwarding agents have in the past, in so far as they have succeeded in operating contrary to the tariffs of the railroad companies, combined articles of widely different character in the same carload. This is not the usual case with single owners of carload shipments. The result of such combinations of different kinds of goods, of light and breakable with heavy and unbreakable articles, has been in the past to increase claims for damages to the freight, often resulting in lawsuits. And I am advised by counsel, that the railroads in the event of loss or damage to carload shipments of forwarding agents, are subject not only to suits by the forwarding agents, but also to suits in tort by the several actual owners of the freight" (Trans., p. 128).

The testimony on behalf of the interveners *with respect to household goods, furniture, machinery, implements and buggies in Western Classification Territory*, was not in line with the portion last quoted of Mr. Caldwell's affidavit, but clearly did not contradict it, because the latter related to conditions in Official Classification Territory, and the almost unlimited extent of consolidating and forwarding operations within that territory with respect to the several thousand carload ratings and the unlimited number of combinations that might be made of commodities under those ratings.

Generally speaking, it will be observed that practically all the testimony relied upon by appellants in this case is testimony with respect to conditions prevailing in Western Classification Territory in regard to the five or six commodities which the witnesses testified they combined to a greater or less extent into carload lots in that territory.

APPROPRIATION BY THE FORWARDING AGENTS OF THE LESS THAN CARLOAD BUSINESS OF THE RAILROAD COMPANIES WOULD NOT MATERIALLY DIMINISH THE EXPENSE OF THE FACILITIES WHICH THE LATTER MUST PROVIDE IN ANY EVENT FOR SUCH BUSINESS.

We quote as follows from Mr. Caldwell's affidavit. This portion of the affidavit is not contradicted by any other evidence.

"Complainants herein have expended vast sums of money in securing equipment and facilities for properly handling their less than carload business as it has developed to its present proportions. Large and expensive terminals in the cities, freight stations and yards, rolling stock and equipment, transfer platforms, loading and unloading equipment, a considerable part of all of which has no connection with carload shipments, have been provided for the less than carload business. A large laboring and clerical force is required to care for this traffic.

"The less than carload rates are based to a large extent on the less than carload expenses. If the expenses are reduced the rates can be reduced, but falling off in less than carload business does not mean a proportionate falling off in the less than carload expenses. A large part of those expenses are constant, having no relation to the amount of less than carload business done. Terminals and freight stations cannot be shrunk, nor the fixed charges for their maintenance diminished to meet the reduction in gross revenue. The same number of trains have to be run, with substantially the same number of cars, whether the traffic be light or heavy. Some reduction in expenses can be made by the discharge

of a few employees in the clerical and laboring forces but even the number of employees cannot be reduced in proportion to the falling off in business" (Trans. p. 128).

THE OPINION AND THE FINAL DECREE OF THE CIRCUIT COURT

The application for a temporary injunction in this case was heard by the Circuit Court, consisting of three Judges and the following opinion was filed :

"Per curiam :

"A majority of the court is in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and do not think it necessary to add anything to his exhaustive discussion of the questions presented.

"An injunction will be granted suspending the operation of the order of June 22, 1908. Inasmuch as both sides, upon the oral argument, agreed that the facts were fully presented, this application may, if all parties consent, be turned into a submission on final hearing and disposed of accordingly" (Trans. p. 299).

The stipulation suggested by the Court was entered into (Trans., p. 304), whereupon a final decree was entered, from which the case comes to this Court on appeal by the Commission and by the intervening corporations, the Export Shipping Company not having answered.

THE CONCLUSIONS OF CHAIRMAN KNAPP ADOPTED BY THE CIRCUIT COURT.

The Court having adopted the reasoning and conclusions of Chairman Knapp's opinion, we quote therefrom as follows :

Looking at the substance of the transaction, it is apparent that the real shipper—the person who furnishes the goods, desires their transportation, and

pays the freight rate--can make no allegation of discrimination, unjust or otherwise, for he is charged precisely the same amount as any other shipper of the same amount of like traffic between the same points. If the real shipper cannot complain, it is difficult to see on what theory his agent can do so. Holding, as I believe we should, that when the forwarding agent collects traffic from various owners and forwards it to various consignees he is not a shipper, but merely a forwarder, it follows that he has no just complaint so long as he is allowed the same rates as other forwarders ; but no question of discrimination between forwarders is here presented. Moreover, the Supreme Court seems to have decided in the Wight case that the rule of section 2 applies only to shippers. Speaking of this section the court says :

" ' The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another.'

" This language tends strongly to support the idea that the section prohibits discrimination between shippers, not between *physical carloads of freight*, and that so long as shippers are given equal rates for similar services no violation of the section occurs. * * *

" In order that the views herein expressed may not be misapprehended I add a summary of my conclusions and a brief statement regarding their application. The question whether circumstances and conditions are substantially similar within the meaning of the second section is a question of fact to be determined in each case as it arises. In determining this question of fact the Commission is not confined to the physical act or incidents of transportation, but may within limits take into account matters affecting the interest of carriers and the public which occur before the traffic is offered for carriage or after its delivery at destination. Upon the record in these cases, and for the reasons above stated, I find as a matter of fact that carload traffic offered by a forwarding agent or other person acting in a similar capacity, and consisting of less-than-carload shipments of diverse ownership, is not transported under substantially similar circumstances and condi-

tions as compared with like carload traffic of single ownership; and from this finding it follows as a conclusion of law that the refusal of carload rates to such forwarding agent or other person is not 'unjust discrimination' as that term is used in the second section. In other words, where the circumstances and conditions are in fact substantially dissimilar the carrier has the legal right, if it chooses to do so, to make a reasonable difference in rates. It is for this reason that the denial of carload rates to the forwarder is not unlawful. * * *

"In my judgment, the forwarding agent, the commission dealer in freight rates, who seeks to buy transportation at wholesale and sell it at retail on his own terms, is not entitled to the order sought in these proceedings.

"These considerations lead to the conclusion that the rules in question do not violate the second section of the act, and are therefore not unlawful" (Trans., pp. 48-50).

THE POINTS TO BE DISCUSSED IN THIS BRIEF.

We submit that the decree of the Circuit Court should be affirmed because:

1st. The Act to regulate commerce does not require railroad companies to afford the forwarding agents the opportunity to participate in the transportation business over the lines of the railroad companies.

2d. Under Section 2 of the Act, railroad companies in adjusting rates are not confined to a consideration solely of circumstances relating directly to the transportation, but may consider other matters fairly warranting difference in rates, but the Commission entirely excluded all such other matters from consideration.

3d. The Commission excluded from consideration circumstances which related directly to the transportation.

4th. The Commission excluded from consideration circumstances which related directly to the physical act of transportation.

Practical Considerations Which Demand the Exclusion of Forwarding Agents from Participation in the Business of the Railroad Companies.

Before discussing the points of the brief in detail, we will mention some practical considerations which have a vital bearing upon the whole subject.

CARLOAD RATES ARE LEGAL, BUT THEIR ESTABLISHMENT BY RAILROAD COMPANIES IS DISCRETIONARY.

From an early period in the history of American railroad rates it has been the practice to establish on some commodities a less rate when shipped in carload lots than when shipped in less than carload lots.

Shortly after the passage of the Act to Regulate Commerce the question of the legality of these two bases of rates was presented to the Interstate Commerce Commission and the Commission held that the lower carload rate was not an unlawful discrimination against the shipper of the less than carload lot upon which the higher rate was charged.

Thurber vs. N. Y. C. R. R. Co., 2 I. C. R., 742.

Since these decisions we are not aware that this system of rate-making has been seriously attacked, and to-day the system prevails to a greater or less extent throughout the United States.

While it is thus established that the Act to Regulate Commerce *permits* carriers to establish lower rates on car load lots, it is equally established that the Act does not *compel* the establishment of such lower rates and that the establishment of such rates is to a very large extent in the discretion of the carrier.

Planters' Compress Co. vs. C. C. C. & St. L. R. R. Co., 11 I. C. C. R., 382, 409.

CONDITIONS IN OFFICIAL CLASSIFICATION TERRITORY NECESSARILY
SUCCESSIONAL CLASSIFICATION RULES IN QUESTION. THE
RIGHT TO MAKE THOSE RULES HAS AN IMPORTANT
BEARING ON THE EXTENT TO WHICH CARLOAD RATES
MAY BE ESTABLISHED.

In Southern Classification Territory the carload ratings are only $22\frac{1}{10}$ per cent. of the less than carload ratings; in Western Classification Territory the corresponding figure is $29\frac{8}{10}$ per cent.; while in Official Classification Territory the corresponding figure is $72\frac{4}{10}$ per cent. (Trans., p. 30).

Thus the carriers in Official Classification Territory to much greater extent than the carriers in Western and Southern Classification Territories have given the shipping public the benefit of lower rates when shipping in carload lots.

But there is probably an even more significant difference which operates in favor of comparatively lower rates for the shipping public in Official Classification Territory, to wit, in Western and Southern Classification Territories the general rule is that the lower carload rate will be applied only upon a carload lot consisting entirely of a single commodity. Thus the shipper cannot get the benefit of the lower rate on any commodity, generally speaking, unless he is able to ship enough of that commodity alone to constitute a carload lot. On the other hand, in Official Classification Territory the shipping public is permitted to get the lower rates upon a carload of a combination of any two or more commodities. The freight rate applicable to such a mixed carload is the carload rate for the highest class of freight contained in such carload (Trans., p. 125).

In view of these radical differences of policy as to carload rates it is apparent that if the carriers in Official Classification Territory should apply their carload rates to carload lots combined by forwarding agents the result

would be that the forwarding agents could and would appropriate a large part of the entire less than carload traffic on account of the vast number of carload rates (about 4,234 in all) and the general permission to ship at such rates mixed carloads of any and all commodities to which carload rates apply.

That this would involve a very serious interference with the traffic and revenue of carriers in Official Classification Territory is apparent from the fact that in Official Classification Territory "*fully one-half of the westbound freight consists of less than carload shipments and a large part of the eastbound traffic is of the same character*" (Trans., p. 126).

On the other hand, it is clear that no such possibility for encroachment by forwarding agents upon the revenues of the carriers could arise in Western or Southern Classification Territory, where there are very few carload rates, and where, generally speaking, no such rate can be applied except upon a carload consisting entirely of a single commodity.

Under such circumstances the policy of the carriers in Official Classification Territory in giving the shipping public such general benefit of lower rates upon carload shipments must be influenced largely by the ability of the carriers to protect their ordinary less than carload business against appropriation by forwarding agents. If the Commission's order be lawful it must follow that the only way the carriers can protect their business from the forwarding agents is to restrict, and perhaps to withdraw entirely, the lower rates on carload lots, and the privilege of shipping mixed carloads. This seems to be recognized by the Commission, because in its answer it suggests that the carriers can avoid the consequences of having forwarding agents operating over their lines *by abolishing entirely the use of carload rates* (Trans., p. 86).

" ticket scalper " who solicits and combines the patronage of individual passengers in such a way as to get the benefit of the lower rates afforded by excursion tickets or mileage books.

THE CLASSIFICATION RULES HAVE AN ADDITIONAL JUSTIFICATION IN PHYSICAL DIFFICULTIES WHICH HAVE NO ANALOGY IN THE PASSENGER TRAFFIC.

In addition to the right which the carrier has to protect its revenues from its natural " retail business " against encroachment by freight scalpers or ticket scalpers, the carriers are confronted with respect to their freight business with a consideration which does not exist to any substantial extent with respect to their passenger business, and which makes of especial importance the protection of the carrier's revenue from its ordinary less than carload business.

With respect to passenger travel substantially the same terminal services and train services are rendered equally to the " wholesale passenger travel " (on excursion tickets, mileage books, etc.) and to the " retail passenger travel " (on single trip tickets). With respect to freight traffic, however, these services are very different in the case of carload traffic and less than carload traffic. Carload traffic is loaded by the shipper and unloaded by the consignee, while less than carload traffic is loaded and unloaded by the railroad company through its freight houses. If the carriers be deprived of the revenue from the principal part of their less than carload traffic they will not be relieved of their duty to care for such traffic and will still have to provide substantially the same terminal facilities. (*Supra*, p. 17).

Moreover, there are physical differences in the handling of carloads by forwarding agents as compared with handling carloads for the general shipping public while no physical differences as to " retail " and " wholesale " passenger traffic. (*Supra*, pp. 14, 15.)

THE GOVERNMENT ADOPTS IN THE POSTAL SERVICE RESTRICTIONS SIMILAR TO THE RULES CONDEMNED BY THE COMMISSION.

It is interesting to note in passing that the United States Official Postal Guide, July, 1909, page 173, Section 101, reads as follows :

"No parcel may contain packages addressed to persons other than the person named in the outside address of the parcel itself. If such enclosed packages be detected they must be sent forward singly, charged with new and distinct parcel postage rates."

THE INTERVENTION OF FORWARDING AGENTS IN THE BUSINESS OF THE RAILROAD COMPANIES INVOLVES SERIOUS DISADVANTAGE TO THE PUBLIC INTEREST, AS WELL AS TO THE RAILROADS.

It cannot be assumed that the business of forwarding agents, if they are permitted to avail themselves of the carrier's carload rates, would prove to be comparatively unimportant in Official Classification Territory. If all the carload rates and privileges of combining carloads afforded in the Official Classification Territory be opened up to the forwarding agents it is apparent that there will be a wide-spread development of such agencies, which must result either in large reductions in the revenues of the carriers, or in the readjustment of rates to avoid those reductions. In either event the carriers, and eventually the public, must suffer. It is apparent that the forwarding agents are not amenable to the law, that many of them may be utterly irresponsible, that the fixing of rates by them will be a mere matter of barter, that they may discriminate between different shippers, and may refuse absolutely to serve specific shippers.

It is also apparent that the business, if fostered as it would be under the Commission's order, might develop numerous forwarding companies controlling tremendous

amounts of traffic, wielding large influence over railroad companies, their motive being to procure unlawful concessions, not for the benefit of the general public, but for the benefit of these intervening transportation agencies. It is evident that the entire influence of these forwarding companies would be to increase the disparity between carload rates and less than carload rates in order to increase the margin of profit for the forwarding companies. These forwarding agencies would be unnecessary middlemen engaged in the transportation business and in the last analysis their profits and their expenses would be a burden upon the transportation service and indirectly upon the public.

Practically all the testimony before the Commission was confined to the conditions under which household goods, furniture, machinery, implements and buggies were handled by forwarding agents in the territory between Chicago and the Pacific Coast. This testimony threw no light upon the conditions which would exist in Official Classification Territory if the 4,235 carload ratings in that territory (Trans., p. 125) were open with all their possibilities of combination to the unrestricted use of forwarding agents.

This case involves no question of the propriety of carload rates, or of permitting combinations by a single owner of various commodities to make up a carload, or of the present differentials between carload rates and less than carload rates.

Nor does the case involve the convenience of shippers in combining several shipments so as to get the benefit of a through car and avoid transfer in transit (as sometimes happens with less than carload shipments). It is not claimed that the rules condemned prevent shippers from combining their shipments so as to get a through car, provided each shipper pays the less than carload rate applicable to his shipment. Moreover, the evidence shows (Trans., p. 129) that in Official Classification Territory elaborate arrangements for

expeditious through car service with the minimum of transfer in transit are made for the benefit of less than carload shipments.

Forwarding Agents not Within Scope of Section 2.

The Commission's order necessarily assumed that under the Act to Regulate Commerce, railroad companies owe the same duties to forwarding agents as to the shipping public, but did not discuss the point either in this case or in the Wells Fargo case.

THE VIEWS OF COMMISSIONERS KNAPP AND HARLAN.

This was one of the points, however, upon which Commissioners Knapp and Harlan dissented. Their reasoning was expressed in the opinion of Commissioner Harlan in the Wells Fargo case (Trans., p. 63) as follows:

" All that is said by the chairman of the Commission in his dissenting opinion in Export Shipping Company cases (*infra*, p. 437), applies with even greater force here, and relieves me of the necessity of formally stating the reasons that compel me to dissent from the conclusions reached by the majority of the Commission in this proceeding. There is one question, however, that has had but little consideration in either proceeding, although of controlling importance in both, as it seems to me, and especially so here, and that is, How far may a carrier be compelled against its will to serve a competitor to the detriment of its own interests ?

It is regarded ordinarily as a principle of common right that a person engaged in any kind of business may refuse his services and the use of his facilities to a competitor. And I see no reason why this rule of self-protection, concededly sound in all other forms of commercial activity and enterprise, should not be available to common carriers ? It is said, however, in the majority opinion, that a forwarder is not a common carrier, and, therefore, is not a competitor of an express company, for example, when he gathers

express matter from merchants and tenders it to the express company, and demands its services in carrying the shipment to destination. This obviously is a strict technical view of the status of a forwarder and of his relations to his patrons. It is true that he may not incur all the liabilities and subject himself to all the responsibilities that the law imposes upon common carriers, but a forwarder, is, nevertheless, engaged in the business of transportation. Whatever may be the form under which the business is conducted, he makes his income out of transportation. He steps in between the express company and its patrons and collects express matter and delivers it at destination and fixes and receives a rate that will compensate him for his services. Although it is said that in doing this he is simply taking advantage of the rates which the express company offers to the shipping public, yet in every practical and substantial sense he is himself the transporter of the merchandise so far as his patrons are concerned. If he is not a common carrier in the strict sense of that term, it is quite clear that he is not a shipper, except in a very loose sense. And to call him a shipper and accord him the rights of a shipper under the act to regulate commerce is to ignore the fact that he has nothing of his own to ship, but is simply selling transportation to those who have. He is a mere trafficker in freight rates, just as a ticket scalper is a trader in passenger fares.

But the special point to which I wish briefly to allude here is that in carrying on his business the forwarder comes into immediate and direct competition with the express company. By getting in between the express company and the shipper the forwarder is able to give the shipper a rate that has no lawful existence and is subject to no regulation or control, a rate which the express company could not lawfully accord to the shipper and the shipper could not lawfully accept from it. The shipper gets the same transportation, but at less than the lawful rate, on packages or small shipments, while the forwarder is compensated for his services by selling the transportation at more than the lawful rate for bulked shipments. In my judgment, this is nothing more or less than an absorption by the forwarder of the lawful revenues of the express company. And when an express company is required, as they are under the principles announced by the majority in this case, to carry for

forwarders, they are in effect required to put their facilities at the service of, and to carry for, persons directly competing with them.

To give to forwarders the status and the rights of shippers is to make the business of forwarding a permanent feature in our commerce. This is to be regretted, not only because there seems to be no real general need of forwarders in this country, but because no advantage can come through them to the general public. Some shippers may in that way get lower rates than they now enjoy, but to the general shipping public the result cannot be other than disadvantageous. Anything that tends to increase the bulked shipments of express companies tends to diminish their revenues, and as a consequence to require a readjustment of their rates. As was well stated on the argument, it is not economically a sound proposition to interpose a new factor in transportation between the shipper and the carrier, a middleman must make his living out of transportation. While the immediate result of this decision may be to enable the forwarder to carry on his business at the expense of the revenue of the carrier, the ultimate result will be to require the shipping public to support both the carrier and the forwarder.

"I am requested by the chairman of the Commission to say that he concurs in this dissent."

Upon this point the following remarks of Commissioner Knapp are pertinent :

"The railroad is a carrier of both carload and less than carload freight. It is under legal obligation to furnish cars, engines, warehouses, truckmen, and clerks for the handling of less-than-carload traffic. Being under this obligation, it is difficult to see how the carrier can be forced, against its will, to allow a third party to come in and assemble and distribute its package freight and take the revenue which accrues from that service. If the forwarding agent may intervene in the transaction and perform the work of collection in cars and of distribution at the end of the carriage to the real consignees, it is evident that the operation diverts from the carrier to the forwarding agent whatever profit there may be in the accessorial service of loading, unloading, and billing and materially reduces the revenue which is properly applicable to the maintenance of the carrier's less-than-carload plant" (Trans., p. 45).

THE LIMITS OF THE QUESTION DISCUSSED.

The question is whether under the Act to Regulate Commerce it is the duty of the railroad company to accord forwarding agents as such the same rates and treatment which it accords to the shipping public.

We concede that a forwarding agent who tenders a less than carload shipment as the representative of the person owning that shipment is by virtue of such representation entitled to the same less than carload rate that real shipper is entitled to. The forwarding agent, however, repudiates the idea of representation, and claims to be independent shipper in his own right, so as to get the carload rate.

We concede also that if the railroad company's published rates by their terms apply to forwarding agents, the railroad company must conform to such published rates and give the forwarding agent the benefit thereof. But the railroad companies' published schedules expressly declare that the carload rates do not apply to forwarding agents, the question is whether the Act requires the carriers to change their schedules so that the carload rates shall apply to forwarding agents.

AS TO THE FORWARDING AGENT THE DIFFERENCE BETWEEN CARLOAD AND LESS THAN CARLOAD RATES IS A MATTER OF ACCIDENT WITH RESPECT TO WHICH HE HAS RIGHTS AND THE RAILROAD COMPANIES MAY EXCLUDE HIM FROM THE BENEFIT OF THAT ADJUSTMENT.

The forwarding agent as such has no interest in the difference between the carload rate and the less than carload rate or in the carload rate separately considered. His sole interest is that there shall be such a margin between the two as to give him a satisfactory profit; the wider the margin the better for him. Although the size of this margin is the forwarder's business, he is entitled to have it protected by the railroad companies.

agent's sole interest in the rate, he would not have any standing in any tribunal to complain that the margin between the two rates is too small to suit him, or to complain of its being wiped out altogether. The Commission by its answer (Trans., p. 86) recognizes and suggests that as against the forwarding agent the railroad company has an absolute right to abolish the margin between the carload rate and the less than carload rate. In this respect the forwarding agent occupies a radically different position from the owner of property who ships by the carload. The latter has a common law and a statutory right to a reasonable rate for the service in which he is interested, but admittedly the forwarding agent has no right whatever to the rate adjustment of which he seeks to get the benefit.

Such being the situation the business of the forwarding agent exists, not by virtue of any right to the margin between carload and less than carload rates, which margin alone makes that existence possible, but solely by virtue of what, so far as he is concerned, is a purely accidental circumstance, to wit: the creation by the railroad company of a difference between carload and less than carload rates. We submit that no right of the forwarding agent is violated if that purely accidental circumstance is eliminated by a provision on the part of the railroad companies that their carload rates shall not be for the benefit of the forwarding agent as such.

THE FORWARDING AGENT PERFORMS A PART OF THE BUSINESS OF THE RAILROAD COMPANY AND THIS THE RAILROAD COMPANY IS NOT REQUIRED BY LAW TO PERMIT.

In the ordinary course of business the railroad company receives, loads, transports and unloads less than carload business and delivers for each such shipment a bill of lading, acknowledging receipt and undertaking to deliver at

destination. The entire service which the railroad company so performs is the ordinary railroad transportation service for the less than carload shipper. For this service the railroad company must provide loading and unloading and accounting facilities, as well as transportation facilities. For this entire service the railroad company receives as compensation its lawfully established rate. When the forwarding agent intervenes in the performance of this transportation service he executes a contract acknowledging receipt and undertaking to deliver at destination, he performs a part of the transportation services, to wit: loading and unloading, and he employs the railroad company to perform the balance; and he does all this at the expense of or in competition with the railroad company. We submit that at common law the railroad company in this country was not bound to permit any other agency to perform over the railroad company's line any part of the transportation service which it was bound to furnish to the public, and that in this respect the Act to Regulate Commerce has made no change in the law.

We submit that the attitude of a railroad company toward a forwarding agent is strictly analogous to the attitude of the railroad company toward numerous agencies which the railroad company may, or may not, permit to perform some function of the transportation service which the railroad company itself has a right to perform or control. Such cases are the following:

(a) A railroad company in the performance of its obligation to carry passengers may make an exclusive contract with a company to supply and operate special cars, such as sleeping cars.

Chicago, etc., R. R. Co. vs. Pullman Southern Car Co., 139 U. S., 79 (1891).

(b) A railroad company in the performance of its obligation to load, unload and care for live stock may

make an exclusive contract with a stock yard company.

Cent. Stock Yards Co. vs. L. & N. R. R. Co., 118 Fed. Rep., 113 (1902).

The right to make such exclusive contracts implies, or rather grows out of, the fundamental right of the railroad company to perform such phases of the transportation service itself to the exclusion of all persons seeking to intervene for that purpose. The same principle justifies the railroad companies in excluding forwarding agents who seek to intervene in phases of the railroad business.

Cases similar in spirit to the cases just cited are the following:

(a) A railroad company cannot be compelled to make with connecting railroads the same terms as to through rates, through cars, etc.

Oregon S. L. & U. N. R. Co. vs. N. P. R. Co., 61 Fed., 158 (1894).

Little Rock, etc., Ry. Co. vs. St. L., etc., Ry. Co., 63 Fed. Rep., 775 (1894).

St. Louis Drayage Co. vs. L. & N. R. R. Co., 65 Fed., 39 (1894).

Gulf C. & S. F. R. Co. vs. M. S. S. Co., 86 Fed., 407 (1898).

(b) A railroad company owning a wharf may make an exclusive contract with a connection, whether railroad or steamship company, as to the use of the wharf, even though thereby all its traffic is diverted to one connecting transportation company.

Louisville & Nashville R. R. Co. vs. West Coast Naval Stores Co., 198 U. S., 483 (1905).

(c) A railroad company may give to a baggage and transfer company the exclusive right to solicit business on its cars and premises.

Donovan vs. Pa. R. R. Co., 199 U. S., 279 (1905).

IN THIS COUNTRY RAILROAD COMPANIES ARE NOT COMMON
CARRIERS OF OTHER COMMON CARRIERS AND, A FORTIORI,
ARE NOT COMMON CARRIERS OF FORWARDING AGENTS.

The essential doctrine of the Express Cases, 117 U.S. 1, is a clear warrant for the position that railroad companies are not bound to permit intervention in their business by the forwarding agents.

The Express Cases establish in this country the doctrine that, although railroad companies are under a duty to provide express facilities for the shipping public, they are under no duty to carry for any one or more express companies for that purpose, and based that holding upon two propositions :

FIRST. That in this country railroad companies are not common carriers of other common carriers, except so far as that character may have been established by usage.

SECOND. That no such usage as to express companies has been established.

The Commission conceives that it disposes of the application of the Express Cases to the present situation by the statement that that case held that the railroad company is not a common carrier of common carriers, and claims that the forwarding agents are not common carriers (*Trans.* p. 53). According to this reasoning, it would seem that if a forwarding agent so conducts itself as to be a common carrier so as to be under a legal duty to serve the public fairly and impartially, then it cannot compel the railroad company to serve it ; but if it retains the character of a private carrier or shipping agency, free to serve whom it pleases and to discriminate as it pleases, then the railroad company must serve it ! We do not believe that any such distinction arises in the Express Cases. If a railroad company is not bound to permit an intervening agency which is subject to all the responsibilities of a common carrier to intercept any

phase of the railroad company's business and revenue, then *a fortiori* the railroad company is not bound to permit such intervention and such interception by an agency which is under no obligation whatever to the public. Clearly the Express Cases would not have been decided for the express companies if they had shown that they were only private carriers or shipping agencies and not common carriers. The controlling proposition of the Express Cases is that the mere public function of a railroad company, in the absence of a special usage, does not obligate the railroad company to permit any other agency for the latter's own profit to use the railroad facilities for performing any part of the business of the railroad company.

It is clear that the railroad companies have never, by usage, recognized any duty to serve the forwarding agents. In this respect our position is stronger than that in the Express Cases, for there it had been almost universal to permit express companies (under special contracts it is true) to carry on the express business, while here the railroad companies have not permitted on any terms the handling of business by forwarding agents and have expressly prohibited such intervention.

In the Express Cases the Court referred to the inconvenience that would result to the railroad companies if compelled to afford separate express facilities to several different express companies. But manifestly such inconvenience could not of itself have set aside any legal duty of the railroad companies as common carriers to serve the express companies.

In passing, it is interesting to note that the President of the Export Shipping Company gave bills of lading for the shipments delivered to it, which he said "are recognized in banking circles." He also said: "Our bills of lading are entirely similar to the fast freight lines" (Trans., p. 138). He also insisted (Trans., p. 146) that his company was in

THE ACT TO REGULATE COMMERCE HAS NOT CHANGED THE
COMMON LAW DOCTRINE IN THIS RESPECT.

We submit, therefore, that prior to the passage of the Act to Regulate Commerce, railroad companies in this country were not under any duty to permit the use of their lines by forwarding agents even if the latter were common carriers; and that the same rule would apply with much stronger force if the forwarding agents were not common carriers.

That Act did not undertake to create or define the fundamental duty of the common carrier to carry for the public. The Act took that duty as it existed and simply regulated that duty so as to insure reasonable and equal treatment to all persons to whom the carrier by virtue of its public function owed the fundamental duty of carriage.

In *B. & O. R. Company vs. Voight*, 176 U. S., 498, 509, decided since the passage of the Act to Regulate Commerce, the Court reapplied the doctrine of the Express Cases; and many of the cases considered on pages 34, 35 of this brief were decided since the passage of that Act. That Act is not understood to require any railroad company to permit any outside agency to intervene in the performance of any phase of the railroad company's ordinary transportation service.

THE SPECIFIC JUDICIAL DECLARATIONS BOTH IN THIS COUNTRY
AND CANADA SUPPORT THE VIEW THAT RAILROAD COMPANIES ARE NOT BOUND TO APPLY THEIR RATES SO AS
TO ENABLE FORWARDING AGENTS TO DO BUSINESS.

The substantial interference of a forwarding agent with the business of the railroad company and the impropriety of enforcing such interference were recognized in *Lundquist vs. Grand Trunk Western Ry. Co.*, 121 Fed., 915, which involved the validity of a rule of the carriers providing that carload rates should not be applied to carloads combined by forwarding agents.

Among other things, the court said :

" It would be a novel proposition to hold that defendants are required to furnish facilities for undermining their own business. It may well be that, if railroads were to handle nothing but carload lots, they would find it necessary to materially change their rates. There is in this objection a strong appeal to one's sense of justice, but I do not deem it necessary to dispose of the case upon this ground " (121 Fed., 917).

We find a similar attitude toward forwarding agents in Canada. *Johnson vs. Dominion Express Co.*, 28 Ont. Rep., 203, was an action brought by a forwarding agent to compel the express company to carry packed parcels made up by him on the same basis that it carried parcels of similar size for individual shippers. The action was analogous to the complaint of the Export Shipping Company before the Commission.

The court held that the express company did not hold itself out to the public as a carrier of the goods of a rival carrier which should attempt to get a carload rate.

" Nor do I think that the plaintiffs or any of the public could for a moment fairly argue or assert that they believed, or were led to believe, that the defendant company professed to carry such packed parcels, or was an association doing business in such a manner " (quoting in support of this statement *The Express Cases*, 117 U. S., 1). " I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right absolutely to decline to carry parcels so packed for the plaintiffs, but I say I do not think the defendant ever intended to hold itself out to the public as the carrier of goods of a rival express company, making use of its capital and its facilities for doing business to the aggrandizement of its rival and its own destruction " (pp. 210, 211).

The court also held that the express company could not in fixing its rates have contemplated such competition by the forwarding agent, saying :

" No such case as the one before me could have been in contemplation of the defendant company. That a number of persons should combine to carry on a business in competition with the defendant, to take from it the most profitable part of its business; to make use of its capital and facilities for its destruction, cannot be assumed to have been considered or provided for by the company in fixing its present tariff " (pp. 209, 210).

The court also held that the English doctrine did not apply.

SECTION 2 SEEKS TO SECURE EQUALITY BETWEEN SHIPPERS IN THE ORDINARY SENSE. THE FORWARDING AGENT IS NOT A SHIPPER IN THAT SENSE.

The Act to Regulate Commerce was enacted to protect shippers in the accepted sense of that term and not to protect persons who participate in the transportation service for their own profit as transportation agencies and at the expense of the railroad companies; and it is not a violation of the equality which is due to "shippers" within the meaning of Section 2 for a railroad company by its published schedule to apply its carload rates to shippers in the accepted sense of that term and to prohibit the application of such rates to such business of forwarding agents.

The object of the decision in U. S. vs. Wight, 167 U. S., 512, was to effect equality between two brewers competing with each other. The Court said :

" It was the purpose of the section to enforce equality between shippers and it prohibits any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor " (p. 518).

Mr. Justice SHIRAS, in the case of Texas & P. R. R. Co. vs. I. C. C., 162 U. S., 197, 219, says:

"The principal purpose of the second section is to prevent unjust discrimination between shippers."

The Commission has given expression to this view of the law in Brownell vs. C. & C. M. R. R. Co., 4 I. C. R., 285, 292, wherein it says:

"The Commission believes that the law to regulate commerce was intended to secure to *persons needing transportation service*, the nearest possible approximation to equal treatment."

The forwarding agent declines to be considered as the mere representative of the person who is interested in increasing the availability of property by procuring its shipment. The forwarding agent claims that he must be considered on his own merits as a person contracting with the railroad company for transportation.

Accepting him in this light, we find his contract with the owners of the goods is that he will receive their freight at place "A" and deliver it to the consignees at place "B", for a given consideration. He seeks to carry out this contract by employing the railroad company to act for him.

Viewing him in this capacity, we submit he is not a shipper in the accepted sense of that term, any more than an express company is a shipper. The person whose property he contracts to deliver is the real shipper. The forwarding agent has no beneficial interest in the goods shipped except so far as he is enabled by his peculiar relation thereto to carry on a profitable transportation business. His interest in the shipment is nothing different from that of a railroad company in a shipment of any one of its patrons, namely, to secure a profit out of the handling of the goods. He does not furnish the goods or pay the freight. He does not desire the transportation for the purpose of adding

value in the economic sense to any interest he has in the goods, which is the essential inducement to all legitimate shippers.

Nor is he concerned in the slightest degree in the question of equality between shippers. He seeks in this case to ship at the same rate as carload shippers, but not in order to be on an equality with such shippers. If this were his purpose it would be met and his profits increased by reducing the less-than-carload rates so as to be the same as the carload rates, but obviously this is just what he does not want. His business would thereby be destroyed. He wishes to maintain or increase the present differential between carload and less than carload rates and to ship at the carload rate, not in order to compete in a business way with the carload shippers, but in order to carry on a profitable business as a trafficker in freight rates.

Upon this point the following remarks of Commissioner Knapp (adopted by the lower court) are pertinent :

"Looking at the substance of the transaction, it is apparent that the real shipper—the person who furnishes the goods, desires their transportation, and pays the freight rate—can make no allegation of discrimination, unjust or otherwise, for he is charged precisely the same amount as any other shipper of the same amount of like traffic between the same points. If the real shipper cannot complain, it is difficult to see on what theory his agent can do so. Holding, as I believe we should, that when the forwarding agent collects traffic from various owners and forwards it to various consignees he is not a shipper, but merely a forwarder, it follows that he has no just complaint so long as he is allowed the same rates as other forwarders; but no question of discrimination between forwarders is here presented" (Trans., p. 48).

Even if Forwarding Agents are Within the Scope of Section 2 the Commission Erred in Holding as a Matter of Law that Section 2 Prohibited the Rules Condemned by the Commission.

The Commission having assumed that forwarding agents were within the scope of Section 2 held that the notes to Rule 5-B and Rule 15-E violated Section 2, and ordered their discontinuance.

THE COMMISSION ASSUMED AS A MATTER OF LAW THAT SECTION 2 EXCLUDES ALL DIFFERENTIATING ELEMENTS EXCEPT CIRCUMSTANCES OF TRANSPORTATION, AND THAT SUCH CIRCUMSTANCES MUST BE DETERMINED ONLY BY THE TWO "SIMPLE TESTS"—THE CHARACTER OF THE GOODS AND THE DESTINATION.

It is important to bear in mind that this order of the Commission was based upon a fundamental error of law in construing the meaning of Section 2. This will appear from a brief consideration of the Commission's attitude as disclosed by the record.

The Commission's conclusion in this case is as follows :

"The note to Rule 5-B and Rule 15-E of the Official Classification, as quoted above, are unjustly discriminatory, unjust, unfair, and unreasonable in this : That they provide that defendants shall collect *a greater compensation from certain persons for the transportation of property subject to the act to regulate commerce than defendants collect from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.*

A carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the applicability of its rates. Complainant is entitled to reparation to an amount equal to the difference between the amount collected by defendants and the amount which would have been

collected if each shipment had been treated as an entirety and the carload rate assessed in each case. An order will be entered in accordance with these conclusions" (Trans., p. 27).

The only respect in which the orders are declared to be unlawful is that set forth in the language which is italicized. That language is the language of Section 2 of the Act, and is not found elsewhere in the Act. Therefore, the Commission bases its order solely upon the opinion that the rules in question violate Section 2 of the Act.

The Commission sustains its conclusion solely by the assertion as a proposition of law that "a carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the application of its rates."

The Commission further explains its position by the statement (Trans., p. 27), that "these cases are governed in all respects by the decision just rendered in the case of California Commercial Association vs. Wells Fargo & Co."

The opinion of the Commission in that case shows that its view that under Section 2 of the Act "a carrier may not properly look beyond the transportation to the ownership of the shipment as a basis for determining the application of its rates," is simply a phase of a still broader error in the Commission's construction of Section 2 of the Act.

The Commission declares:

"Unless there be a difference in the conditions of carriage, there can be no difference in charges under Section 2 of the act as interpreted by the Supreme Court" (Trans., pp. 58, 59).

The Commission establishes its understanding of this supposed interpretation by this Court by declaring that under Section 2 of the law, the only tests for determining the rate which a carrier may charge are

"the simple tests which may be put by the carrier's agent at the time of shipment: (a) Who offers this

shipment? (b) Of what does it consist? (c) To whom, and where, is it bound?" (Trans., p. 55).

By way of explanation the Commission adds:

"For its purposes as a common carrier the railroad or the express company *needs no other information than may properly be elicited by these questions*, and it would appear improper and unreasonable that it should be permitted to go into the vague and illimitable realms outside of and beyond such needs. The carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use, and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed. *To veer from this straight course, no matter to how slight a degree, or for what apparently beneficial purpose, is to lead away from the policy of the law which condemns discriminations and preferences*" (Trans., p. 55).

It is important to analyze these "simple tests." The questions "Who offers this shipment?" and "To whom is it bound?" are of interest for purposes of accounting and delivery, but according to the Commission's theory are not of interest for purposes of rate making, because the basic theory of the Commission's decision in this case is that from a rate making standpoint the law prohibits the consideration of the identity of the man who offers the shipment or of the man to whom it is bound. Therefore, for rate making purposes the "simple tests" under Section 2 reduce themselves to (1) "Of what does this shipment consist?"—*i. e.*, what is its physical character and quantity? and (2) "Where is it bound?" This reduction of rate making as far as Section 2 is concerned to a severely physical basis of description of the property, its quantity and the distance hauled, involves a radical departure from the theory of rate making which heretofore the Commission has recognized.

In this connection we quote as follows from page 14 of the Fourth Annual Report of the Commission (Judge COOLEY was its chairman) :

" Thus the cost of carriage to the carrier itself is no more a controlling consideration than is the value of the carriage to the owner of the property, and when both are taken into account, questions of a public character also have weight, inasmuch as it is important to make a great public agency reasonably profitable to its owners, and at the same time as useful as may be to the general public.

" This method of classification has been so long continued and so universal, that every well informed person in a community understands that, made as it is for the purpose of rating, it is based upon an almost infinite variety of circumstances, having regard not merely to the interests of the carrier and the value of his services, but also to the interests of the parties and sections served, and to considerations which may change from day to day so as to demand a change in the proportionate rating " (Fourth Annual Report, p. 15).

THE ENGLISH CASES DO NOT SUSTAIN THE COMMISSION'S ACTION. THE COMMISSION ABSOLUTELY EXCLUDED CIRCUMSTANCES WHICH ARE MATTERS OF INQUIRY UNDER THE ENGLISH STATUTE.

The Commission really relies for its construction of Section 2 on the proposition that the English Courts have given a similar construction to their Equality Clause. Even if the decisions of the English Courts on their Equality Clause were binding on this Court as to the construction of Section 2 of our Act, those cases do not sustain the very narrow view taken by the Commission.

It must be remembered that the Commission holds, as we point out (*supra*, pp. 46, 47), that under Section 2 there can be no difference in the rates if the two shipments are of the same article for the same part of the line. The result of this position is that every other factor affecting rate making

is as a matter of law excluded from consideration by Section 2. This is not the doctrine of the English Cases.

On the contrary, as is pointed out by Chairman Knapp (Trans., p. 34), it is held by the English Courts, even under the narrow language of their Equality Clause, that other factors may be considered to determine whether the goods are conveyed under like circumstances, and one of such factors to be considered, and which was generally submitted to the jury for determination, was whether packed parcels of the forwarding agent were carried under the same circumstances as the packed parcels of the merchant. It will be found that practically all the English Cases relied on by the Commission are consistent with this theory and nearly all of them apply it. But the theory of the Commission goes much further than the English Cases by entirely excluding as a matter of law any consideration of any factor except the two "simple tests" which we point out (*supra*, p. 47), (1) the character of the goods, and (2) the destination of the shipment.

It is also pointed out by Chairman Knapp that the English Cases present the question of a discrimination between the forwarding agent for whom a packed parcel is transported and the merchant for whom a similar packed parcel is transported, and do not present the question involved here of a discrimination between the forwarding agent for whom a consolidated carload is transported and the individual owner for whom an entirely dissimilar straight carload (not consolidated at all) is forwarded. It is believed this will be found true of all the English cases, with the possible exception of the case of *Crouch vs. Great Northern Railway Company*, 11 Exch., 742, and in that case the entire question of similar or dissimilar circumstances was regarded as a question to be determined upon the facts; in other words, the Court held that there were other facts to be considered besides the two "simple tests" of character of the goods and destination of the shipment.

BUT A FAR MORE IMPORTANT PROPOSITION IS THAT THE
ENGLISH CASES DO NOT CONTROL THE CONSTRUCTION OF
SECTION 2 OF OUR ACT.

As to the construction of Section 2, the Commission advances the theory that Section 2 was modeled upon the English "Equality Clause" (being section 90 of the Act of 1845, 8 & 9 Victoria, c. 20), that therefore Congress must be presumed to have adopted the English Courts' construction of the Equality Clause, and that the English Courts have construed that clause as excluding from consideration all differentiating circumstances except difference in physical conditions of carriage.

To support the argument that Congress must be presumed to have adopted the views of the English Courts, reliance is placed upon :

McDonald vs. Hovey, 110 U. S., 619, 628.

Henrietta Mining & M. Co. vs. Gardner, 173 U. S., 123, 130.

In the first of these cases it is stated :

"That where English statutes, such for instance as the Statute of Frauds and the Statute of Limitations, *have been adopted* into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority" (p. 628).

In the second of these cases it is stated :

"The language of paragraph 40 as amended in 1891 *having been taken from* the California Code, it is presumed that it was taken with the meaning it had there" (p. 130).

An illustration of the correct application of this doctrine is afforded by the undue preference clause of the Act to Regulate Commerce. We quote in parallel columns the

pertinent portions of Section 2 of the English Railway and Canal Traffic Act of 1854 and of Section 3 of the Act to Regulate Commerce.

"SECTION 2, ENGLISH RAILWAY AND CANAL TRAFFIC ACT, 1854.

"SECTION 3, ACT TO REGULATE COMMERCE.

* * *

and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *
(17 & 18 Vict., c. 31, Section 2).

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (Section 3, Act February 4, 1887).

Evidently the English clause was "adopted into our own legislation"; the language of our clause "was taken from the English statute."

This being the situation this Court said in Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., 263, 284, after pointing out that the English Traffic Acts did not appear to be as comprehensive as our own, and might justify contracts which would violate our long and short haul clause or be open to the charge of unjust discrimination:

"But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute (McDonald v. Hovey, 110 U. S., 619)" (p. 284).

IN THE PARTY RATE CASE THE CIRCUIT COURT DID NOT ASSUME THAT THE ENGLISH CASES WERE CONTROLLING; BUT ADOPTED A CONSTRUCTION OF SECTION 2 RADICALLY DIFFERENT FROM THE ENGLISH CONSTRUCTION OF SECTION 90.

But it is claimed by the Commission that in Interstate Commerce Commission vs. B. & O. R. R. Co., 43 Fed. Rep., 37, 53, the court held that the Equality Clause was substantially adopted and embodied in Section 2 of the Act to Regulate Commerce and that the Court recognized that the settled construction which the English courts had given to the terms of the Equality Clause must be received as incorporated into our Section 2.

It is evident from the context both on pages 51 and 53 that Judge JACKSON had in mind Section 3 of our Act and the English Cases construing the same language found in Section 2 of the Act of 1854. The statement that our Act had adopted Section 2 of the Act of 1854 was correct. The statement, evidently incidental and not well considered, that our Act had adopted Section 90 of the Act of 1845 was manifestly incorrect.

However, Judge JACKSON's construction of Section 2 of our Act cannot be rested upon this incidental and manifestly inaccurate reference to Section 90 of the English Act, but must be rested upon his repeated statements in the course of his opinion which are inconsistent with the construction by the English courts of Section 90 of the Act of 1845.

We quote some of his references to Section 2 :

"The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that

such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. *Subject to these conditions and limitations, the act does not, and was not intended to, restrict the common law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public.* Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates, based on increased quantity or amount of service" (43 Fed. Rep., p. 44).

"Subject to the requirement of section 1, that all charges made for any service rendered in the transportation of passengers or property shall be reasonable and just, the language of section 2 clearly recognizes and implies that there may be discriminations which are not unjust and not prohibited" (p. 46).

"Said sections [referring to Sections 2 and 3 of the Act] were intended to prohibit favoritism and partiality in traffic rates, where the circumstances and conditions were substantially similar and the service contemporaneous. Persons *in like situations*, requiring or desiring like and contemporaneous service on the part of the carriers, were to be treated, in the matter of rates, impartially" (43 Fed. Rep., p. 47).

"It thus appears that the intention of congress, as expressed in sections 1, 2 and 3, was to secure two leading objects, or effect two main purposes, viz.: *First*, to establish, and impose upon railroad companies engaged in interstate commerce, the duty of conforming to the general rule of the common law in making their charges for transportation services rendered reasonable and just; and, *second*, to prevent unjust inequality, partiality, favoritism, or unfairness, so far as concerned their charges for contemporaneous transportation services, as between persons, traffic, or localities *similarly circumstanced*" (p. 47).

"Under the flexible and elastic rule prescribed by said sections [referring to Sections 2 and 3 of our Act], construed in the light of section 1, a difference

in charges, while an element in the proper definition of unjust discrimination or undue preference, is by no means the sole or controlling factor. To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. In respect to passenger traffic, *the position of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service,, accompanied by irregularity and partiality, resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination*" (p. 49).

"It cannot be properly said in the case under consideration that the lower rate given to a party of ten or more confers upon such party an undue advantage in consequence of injustice inflicted upon the single passenger. *There is nothing competitive in the traffic of the single passenger and the party of ten or more which would make lower rates to the latter operate prejudicially to the former*" (43 Fed. Rep., p. 49.)

"In view of the established facts that it is not claimed or shown that the single passenger rates are unjust and unreasonable, that the 'party rates' are just and reasonable, *that there is no competition or competitive relation between the two classes*, that the 'party rates' open to all who choose to avail themselves of the same are a convenience and benefit to a considerable portion of the traveling public, *that the interests of the carrier are reasonably promoted by their use*, that the cost of service is relatively or proportionately less for the party of ten or more than for the single passenger, and that the difference in charges does not appear to be improperly adjusted with reference to or unjustified by the actual saving or profit to the company, *it cannot be properly said that the traffic is of like kind*" (43 Fed. Rep., p. 54).

We quote also as follows from the opinion of Judge SAGE in the same case :

"Any construction which makes the statute a mere enactment of arbitrary rules to be so administered as to force a rigid and inflexible equality, is in conflict

with the objects which its framers had in mind, and a constant obstacle to the further development of a vast system of transportation" (43 Fed. Rep., p. 59).

Referring to the meaning of the clause "substantially similar circumstances and conditions," he said:

"Again, the testimony establishes that party rate tickets secure patronage that yields large revenues to the respondent, and that the withdrawal of those tickets would almost entirely destroy that patronage; for it appears that the rate is as high as can be made without putting it beyond the reach of those who are the main purchasers. Are all these considerations to be left out of the account in determining whether there has been 'like and contemporaneous service' 'under substantially similar circumstances and conditions?' Does it depend solely upon whether party rate passengers and those holding single tickets occupy the same cars, have the same accommodations, and are traveling from the same point to the same destination? Is that the full meaning of 'similar circumstances and conditions?' The answer—which the question itself seems to suggest—is that the phrase has a much larger and more comprehensive meaning, else congress could not consistently have recognized mileage or excursion or commutation tickets, for all these trespass upon the narrow ground on which the contrary view rests. To give the act its proper interpretation, the phrase must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons; or, in other words, circumstances and conditions of a commercial character, which, while they should not exclude or override the consideration of what is just and reasonably advantageous to those not so situated as to be able to avail themselves of reductions offered to the general public, should be so recognized as not to be prejudicial or unjust to any, and yet, upon the whole, to promote the interest of all concerned in the beneficial operation of the act" (43 Fed. Rep., p. 61).

IN THE IMPORT RATE CASE THIS COURT DID NOT ASSUME THAT THE ENGLISH CASES WERE CONTROLLING ; BUT ADOPTED A CONSTRUCTION OF SECTION 2 RADICALLY DIFFERENT FROM THE ENGLISH CONSTRUCTION OF SECTION 90.

It is also claimed that this Court has declared in 162 U. S., 197, 222, that Section 2 of our Act was modeled upon section ninety of the English Railway Clauses Consolidation Act of 1845, known as the "Equality Clause." This declaration, while undoubtedly true in the general sense that both sections were designed to prevent improper discrimination in rates from the same point to the same destination, could not have been intended as a declaration that this Court in its construction of our second section should adopt the construction placed by the English courts upon their Equality Clause. It is noteworthy that in the case cited this Court had to construe Section 2 and Section 3. In construing Section 3 it quoted at great length from the English cases dealing with Section 2 of the English Act of 1854 and followed those cases ; *but the Court in construing Section 2 of our Act did not quote and did not follow the English decisions under the Equality Clause.* On the contrary, the Court adopted a construction of Section 2 entirely at variance with the construction of the Equality Clause adopted by the English courts.

To show this we quote as follows from this Court's opinion in the Texas and Pacific Railway case :

The Court in condemning the Commission's construction of Section 2 said :

" * * * * We read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, *to take into consideration all the facts of the given case—among which*

are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried" (162 U. S., 218).

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges in given cases were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions.' To answer such questions in any case coming before the Commission requires an investigation into the facts, and we think that *Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.'* Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission" (T. & P. Ry. vs. Int. Com. Com., 162 U. S., 219).

A PARALLEL CONTRAST BETWEEN THE ENGLISH CONSTRUCTION OF SECTION 90 AND THE CONSTRUCTION OF SECTION 2 IN OUR CASES WHICH ARE CLAIMED TO SHOW THAT SECTION 90 HAS BEEN ADOPTED INTO OUR LAW.

To make still clearer the proposition that the very cases upon which the Commission relies to prove that in construing our Section 2 our courts are bound by the construction of the Equality Clause adopted by the English courts, we quote in one column a recent and admittedly correct statement by one of the English courts of the construction of the Equality Clause, and in a parallel column the substance of statements in the opinions of the Circuit Court in the B. & O. case, 43 Fed. Rep. and of this Court in the Texas & Pacific case, 162 U. S.:

"No doubt, when you are dealing with the Railways Clauses Consolidation Act, 1845, as Lord BLACKBURN points out in his judgment in Evershed's Case the words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and *it is not a question of regarding the position of the one trader as compared with the other*, and then saying whether there is any undue preference. *It is an absolute rigid equality which is demanded by the statute.* Lord BLACKBURN said *it might have been very reasonable even in that case to allow other considerations to weigh, but that the legislature had not done so*" (Phipps v. L. & N. W. Ry. Co., L. R. 2 Q. B. D. (1892), 229, 249).

The main object of Section 2 was "to prevent unjust equality * * * between persons, traffic or localities *similarly circumstanced*" (Judge JACKSON, 43 Fed. Rep., 47).

The difference in charges is by no means the sole and controlling factor under the "*flexible and elastic rule* prescribed by" Sections 2 and 3. In respect to passenger traffic "*the position of the respective persons or classes between whom differences in charges are made must be compared* with each other and there must be found to exist substantial identity of situation and of service * * * to constitute unjust discrimination" (Judge JACKSON, 43 Fed. Rep., 49).

"Any construction which makes the statute a mere enactment of arbitrary rules to be so administered as to force a rigid and inflexible equality is in conflict with the objects which its framers had in mind" (Judge SAGE, 43 Fed. Rep., 59).

The phrase "*substantially similar circumstances and conditions*" "*must be held to include circumstances and conditions affecting the business interests of the carrier and of its patrons*; or in other words, circumstances and conditions of a commercial character" (Judge SAGE, 43 Fed. Rep. 61).

In considering whether the Act is violated the Commission should "*take into consideration all of the facts of the given case—among which*

are to be considered the welfare and advantage of the common carrier and of the great body of citizens of the United States" (162 U. S., 218).

To answer the questions arising under the second section consideration must be given to "whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges" (162 U. S., 219).

Thus, the very cases relied upon by the Commission show clearly that from the outset Section 2 of our statute has been given a far broader and more liberal construction than the much narrower language of the English statute has received or could receive.

THE CLAIM THAT SECTION 2 MUST BE CONSTRUED ACCORDING TO THE ENGLISH CASES IS WHOLLY WRONG. THOSE CASES HAVE NEVER BEEN APPROVED OR FOLLOWED BY THIS COURT.

Whether we regard the radical differences in the language between the two statutes, or the radical differences in the constructions placed thereon respectively by the English courts and our courts, there is no escape from the conclusion that the Commission's theory that the construction of Section 2 is controlled by the English courts' construction of their Equality Clause, is altogether wrong.

While this Court has quoted with approval and has followed the decisions of the English Courts on the undue preference clause, it has never approved and has never followed the decisions of the English Courts on the Equality Clause.

In this connection it is significant that in *United States vs. Wight*, 167, U. S., 512, the facts were almost identical with the facts of the case of *Denaby Main Colliery Co. vs. Manchester, etc. Railway Co.*, 11 App. Cas., 97, which was decided under the English Equality Clause. That case and other English cases were urged upon this Court's attention, but in its opinion it made no reference to any of the English cases or to the policy of the English courts or of the English statute, but based its decision solely upon Sections 2 and 6 of our own Act and carefully restricted its observations to the facts of the particular case before it. We discuss this case at greater length below.

THE COMMISSION'S THEORY OF SECTION 2 GREATLY RESTRICTS ITS NATURAL AND INTENDED SCOPE.

It is clear that the broad language of Section 2 of our Act depends upon the meaning of its own terms and upon the construction thereof adopted by our own courts, and not upon the construction adopted by the English Courts of their Equality Clause.

Under Section 2 the difference in charges is prohibited only when the following elements *all* concur:

- (a) When the two services are "like services."
- (b) When the two services are "in the transportation of a like kind of traffic."
- (c) When the two transactions are "under substantially similar circumstances and conditions."

These two "simple tests" adopted by the Commission (*supra*, pp. 46, 47) exclude all consideration of factors of the highest importance in rate making.

- (a) As to differences in the service the Commission's "simple tests" ignore the question of the value of the service to particular classes of shippers, although value of service is a recognized element in rate making.

(b) As to differences in kind of traffic the Commission's theory excludes from view the entire field of legitimate traffic and commercial considerations which serve to characterize and differentiate the various classes of business in which railroad companies engage.

(c) As to differences in circumstances and conditions the Commission's theory, of course, excludes every commercial and traffic consideration not pertaining to the carriage of the goods. It prevents a legitimate difference in rates to develop new traffic or to protect the fair interests of the carrier where there is no competitive relation between the two classes of shippers affected. But in addition *the Commission's theory excludes from consideration every circumstance of transportation except the two circumstances of similarity of goods and similarity of haul.* This theory excludes numerous conditions relating to the circumstance of carriage in a broad, but vital, sense.

Under the Commission's two "simple tests" we find no place whatever for a consideration of:

(a) The general public interest as affected and promoted by particular rate adjustments;

(b) The interest of particular classes of shippers whose welfare can be promoted by rate adjustments which apply to all shippers in competition with each other and do not injure any other shippers;

(c) The fair interests of the railroads' owners at whose sole risk the business is conducted and whose private capital invested therein is dependent entirely on the development and protection of the railroad traffic in every way consistent with the public interest.

(d) Transportation circumstances other than those pertaining to similarity of goods and similarity of haul.

THE CONSTRUCTION OF SECTION 2 IN THE "PARTY RATE CASE."

We have now to inquire whether the Commission's construction of Section 2 is correct.

The construction of Section 2 first arose in the so-called "Party Rate Case," in which the Commission held (2 Interstate Commerce Commission Reports, 729) that it was a violation of Sections 2 and 3 of the Act to Regulate Commerce for the railroad company to make for parties of ten or more persons lower rates per mile than the usual rates. Proceedings to enforce compliance with the Commission's order were brought in the United States Circuit Court for the District of Ohio and were heard and determined therein by Judge HOWELL E. JACKSON and Judge GEORGE R. SAGE, the court holding that the Commission's order was unlawful (Interstate Commerce Commission vs. B. & O. R. R. Co., 43 Fed. Rep., pp. 37, 55). See pp. 54-57, *supra*, for extensive quotations from their opinions.

The Circuit Court held that in considering similarity of kinds of traffic and similarity of circumstances and conditions the Commission and the Court must consider, among other things :

- (1) The relation, whether competitive or otherwise, between the classes of shippers or passengers affected ;
- (2) The reasonable promotion of the interests of the carrier ;
- (3) The general public interest

No one of these considerations could be considered under the two "simple tests" which the Commission prescribes.

The opinions favored a broad and liberal construction of Section 2, so as to permit rate adjustments upon commercial considerations so far as was consistent with avoidance of injurious discrimination and was therefore directly opposed to the rigid and arbitrary policy which the Commission seeks to establish.

Upon appeal by the Commission to this Court the decision of the Circuit Court was affirmed in an opinion delivered by Mr. Justice BROWN. We quote as follows from that opinion :

"It [the Act to Regulate Commerce] was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. *It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable*" (145 U. S., 276).

"If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price *than his competitors*, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, *operate unjustly upon the smaller dealers engaged in the same business*, and enable the larger ones to drive them out of the market.

"The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, *nor is there any legal injustice in one person procuring a particular service cheaper than another*" (145 U. S., 280).

"In this connection we quote with approval from the opinion of Judge JACKSON in the court below: 'To come within the inhibition of said sections, the differences must be made under like conditions; that

advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried ; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered ; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public" (162 U. S., 217).

"The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous', whether the kinds of traffic were 'like', whether the transportation was effected under 'substantially similar circumstances and conditions'. To answer such questions, in any case coming before the Commission, requires an investigation into the facts ; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statutes, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust'. Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission " (162 U. S., 219).

Thus the Court held that in likeness of traffic and similarity of circumstances and conditions the Commission and the Court must consider, among other things:

- (1) "The desire and advantage of the carriers in securing special forms of traffic";
- (2) "The interest of the public that the carriers should secure that traffic, rather than abandon it";
- (3) "The welfare and advantage of the common carrier and of the general public";
- (4) And, generally speaking, "all of the facts of the given case"; "whatever will be regarded by common carriers apart from the operation of the statute as matters which warranted differences in charges."

It will be impossible to find a more striking contrast than that which exists between the construction thus placed upon Section 2 by this Court and the present doctrine of the Commission. This Court declares that every legitimate commercial consideration affecting the fair interest of the shipper, or the carrier, or the public, is entitled to consideration under Section 2. The Commission declares that nothing is entitled to consideration under that Section, except the character of the goods and their destination.

This court has never criticised or qualified in any way the construction of the second section thus adopted by it.

THE WIGHT CASE.

The only other decision of this court involving the application of Section 2 of the act is the case of *Wight vs. United States*, 167 U. S., 512.

In this case the railroad company transported beer in carload lots from Cincinnati to its Pittsburgh depot for Mr. Bruening at a less rate than was charged Mr. Wolf for similar transportation from the same place of shipment to the same depot in Pittsburgh.

The published schedules and classifications of the railroad company recognized that the two services were like services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, because those schedules and classifications did not state any rule or regulation which in any wise differentiated the services performed for Mr. Bruening from Cincinnati to the Pittsburgh depot from the service performed for Mr. Wolf from Cincinnati to the Pittsburgh depot. If there had been any consideration which it would have been legitimate for the carrier to regard as differentiating such service in the one case from the service in the other case, it would have been necessary under Section 6 of the Act for the carrier, in order lawfully to make a difference in charge on that account to set forth such difference in rate and the consideration determining it in its rules.

The only explanation offered for the difference in charge was the fact that Mr. Bruening's warehouse had sidetrack connection with the Pennsylvania Railroad and could have beer shipped by that railroad delivered without paying cartage, and that by reason of this competition the Baltimore & Ohio could not obtain his business without making sufficient reduction in the rate to induce Mr. Bruening to forego the advantage of receiving shipments by the Pennsylvania.

Thus the Wight case lay within exceedingly narrow limits. The carrier by its published schedules had in effect declared that the services were alike, that the two shipments were traffic of like kind, and that the two services were under substantially the same circumstances and conditions. The only question was whether notwithstanding this situation there was any circumstance which could justify a difference of charges under Section 2: There were only two circumstances involved in the case. One was the circumstance of the carriage of the two shipments from Cincinnati to the

same railroad depot in Pittsburg. The other was the circumstance of the competition, *not existing at the depot in Pittsburg, but existing at Mr. Bruening's warehouse.* With the case thus presented the Court held that the circumstance of competition could not be considered, and that the circumstance of similar carriage (which was the only other circumstance involved in the case) was controlling.

The Court pointed out that the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. It pointed out also that Section 6 of the Act required the carrier, in publishing schedules, to "state separately the terminal charges, and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates and fares and charges."

The Court summed up its conclusions respecting the case as follows :

"It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

"It may be that the phrase 'under substantially similar circumstances and conditions' found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. *For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition*" (*Wight vs. United States*, 167 U. S., 512, 518).

We submit that this decision merely effectuated the obvious intent and meaning of the act in a manifest case of a rebate creating an unjust discrimination, but did not impair and was not intended to impair the construction placed by this court upon section 2 in the two previous cases.

Obviously the carrier could not be heard to say that there was competition affecting Bruening, justifying a less charge to Bruening than to Wolf, in view of the fact that the carrier's schedule, under which alone it could transport traffic to Pittsburgh, fixed precisely the same spot for deliveries to Bruening and to Wolf. At that spot no competition could exist as to Bruening that did not also exist as to Wolf. Clearly, therefore, the Court was right in holding in that case that there was no competition which could be considered as differentiating the two cases.

It is noteworthy that the Court did not deem it necessary to refer to the construction placed by it upon Section 2 in its former opinions. The Court treated the Wight case as lying within very narrow limits and disposed of it accordingly. The Court had no occasion to consider the broader question which it had settled in former cases.

The effort of the Commission to extend the Wight case beyond the narrow limits and to make that case in effect overrule the broad construction given to Section 2 by earlier cases would, if successful, destroy the legitimate operation of many commercial factors which naturally differentiate transportation services, kinds of traffic and conditions affecting the transportation business, and would thereby enforce a disregard of the interests both of the public and of the carriers in many respects of great importance.

Such a rule would be illogical, disregarding many substantial reasons why in the interest of the public and of the carriers there ought to be differences of rates and permitting differences on account of mere differences in the physical aspect of the carriage which often would be entirely unimportant.

Indeed, at times there may be a difference in the physical aspects of the property carried and of the circumstances under which it is carried, and yet, viewed broadly from the public interest, the traffic may be of like kind and a

discrimination between the two varieties may be unlawful. This situation is illustrated by the decision of the Commission in *Rice vs. L. & N. R. R.*, 1 I. C. R., 722, where it was held that two shipments of oil, one in barrels, and the other in a tank car, might be the same kind of traffic.

It is manifest that if distinction in rates be restricted solely to conditions of carriage the Act will fail of its real purpose which was to prevent substantial, injurious discriminations, and yet permit non-injurious discriminations which are to the fair interest of the carrier and in the general public interest.

THE ALABAMA MIDLAND CASE.

In the case of *Interstate Commerce Commission vs. Alabama Midland Railway Company*, 168 U. S., 144, arising under Section 4, the Court held that competition prevailing at the destination of the longer distance shipment and not prevailing at the destination of the shorter distance shipment might, within the meaning of Section 4, be a circumstance or condition which would justify a greater charge for the shorter haul to the intermediate point, and in this connection the Court reiterated (p. 166) what it had said—in *Wight vs. United States*, 167 U. S., 512, and explained that under the facts as they existed in that case there was “no room for the operation of competition.” This was clearly true since no competition could exist at the railroad company’s depot in Pittsburgh which would not operate equally for the benefit of both Bruening and Wolf. The Court did this merely to make clear that under Section 2 there was no place for a consideration of competition at destination. Competition at destination was the only thing with which the Court was dealing. The Court did not indicate any purpose to modify or extend the position taken by it in the *Wight* case, or any

purpose to overrule or qualify its construction of Section 2 in Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., 263, and Texas & Pacific R. R. Co. vs. Interstate Commerce Commission, 162 U. S., 197. *On the contrary, the Court referred at length to both of these cases and intimated no purpose to qualify either of them in any respect.*

SINCE THE WIGHT CASE AND ALABAMA MIDLAND CASE THE DOCTRINE OF THE PARTY RATE CASE AND THE IMPORT RATE CASE AS TO SECTION 2 HAS BEEN FOLLOWED BY THE CIRCUIT COURT OF APPEALS IN AN OPINION WHOLLY AT VARIANCE WITH THE COMMISSION'S THEORIES.

In the case of United States vs. C. N. & W. Ry. Co., 127 Fed. Rep., 785, decided after the Wight case and the Alabama Midland case, the Circuit Court of Appeals relied upon the decisions of this Court that dissimilarities as to traffic and circumstances under Section 2 were not confined to dissimilarities in conditions of carriage and did not regard those decisions as overthrown by the Wight case.

This case involved the question whether carriers in transporting soldiers in lots of ten or more were required by Section 2 of the Act to give the Government the benefit of the "Ten-Party Rate Schedule." The Court held that this was not required under Section 2.

To sustain this proposition the Court quoted from the opinion of this Court in the Party Rate Case (145 U. S., 263), and said :

"It is agreed that the government, in the transportation of soldiers, does not in any way come in competition of any kind with any of the parties who are given the party rates. If so, how can it contend that it is entitled to the party rates provided for in the different schedules, or that there is any unjust discrimination against the United States? It is clear that the Government does not fall within any of the

designations of persons or parties named in the schedules. *There is no analogy or likeness between the business of the government in the transportation of its soldiers and the various classes of persons described in the company's schedules.* Under no possible construction of the language can it be claimed that the United States comes within the party rule. The government's business is not like that of a theatrical, operatic, or concert company, or a hunting or fishing party, and it bears just as little likeness to any of the other parties named, as glee clubs, brass bands, boat, baseball, polo, or football teams; nor is it, in the language of the schedules, a party of like character to any of these, regularly organized for the purpose of giving exhibitions and traveling together. The claim that, if the first contention is not good, then that it is unjustly discriminated against within the meaning of the second section of the act to regulate commerce, and subjected to an undue prejudice or disadvantage, under the third section, is equally untenable. In short, the stipulation of facts is both argument and authority against the government's contention. It is not engaged in the same business as any of those classes that are given special rates, is not in competition with them, and is not, therefore, injured or discriminated against" (127 Fed. Rep., p. 789).

"*The traffic provided for the company's schedules has no analogy or resemblance to that carried on by the government. It is not a like service, nor 'under substantially similar circumstances and conditions.'* The finding of facts by the Court below, following the stipulation of the parties, shows conclusively that the circumstances and conditions, instead of being substantially alike, are wholly different, and this finding is conclusive" (127 Fed. Rep., p. 790).

The Court assigned the following differences with respect to the two sorts of traffic and the circumstances and conditions under which they were conducted :

"**FIRST.** The tickets issued under the company's schedule for party rates are limited closely in time, while those issued for the transportation of soldiers are not so limited. This difference is a material one, as, when the time is limited, the carrying company knows when to provide for the service, as it cannot know in the case of tickets unlimited in respect to time."

"SECOND. By giving these party rates, the public interest in amusements of that character is served, as well as the interest of the railway companies, and it would frequently happen that the amusement companies could not travel if they charged regular rates. One purpose of transportation companies is to create and build up business for themselves, and herein their interest coincides with that of the public, so that they are fostered and encouraged in a way that injures no one, while the railway companies are benefited.

"THIRD. It will often happen that, when such parties travel one way over a line of road, their occasion will lead them to travel back the same way, so that the patronage of the road is doubled, and generally what is a benefit to the railroad companies by way of increase of business is a benefit, also, to the public upon which they rely for support.

"FOURTH. The giving of the party rates stimulates other travel, and that is one purpose, no doubt, of giving them, whereas the transportation of soldiers can have no such effect. The singing of Patti or the performance of a Thomas concert might bring 1,000 other people to Chicago, while a football match might bring 10,000 people over the company's road, whereas the transportation of 10 or 20 soldiers would be unnoticeable by the public, and would advantage the road in no way, beyond the receipt of the fare.

"FIFTH. Another material difference is that those who travel by these party rates pay cash in advance, while the government does not. On the contrary, the service must be first rendered, and claims for the same filed at Washington, and undergo examination and be audited by the War and Treasury Departments, and payment indefinitely delayed. This must always constitute a material difference, so long as commodities can be sold cheaper for cash than on credit. It is quite probable that if the government would pay cash for the service performed, the railroad companies might afford to make a corresponding deduction in rates."

"SIXTH. The government, in the transportation of soldiers, does not financially or in any other way come into competition with any of those parties who are given the party rates. Consequently there can be no unjust discrimination in the case, and no cause for complaint by the government; and, if the rates given those parties should be conceded to be illegal, there would be no reason why the government should not also be allowed illegal rates" (127 Fed., 790).

It will be observed that almost all of the differentiating factors regarded by the Circuit Court of Appeals would have to be rejected if the Commission's two "simple tests" are controlling, and that many of the considerations relied upon by that Court would have to be rejected if Section 2 confines questions of dissimilarity of traffic and of circumstances and conditions to mere dissimilarity in the matter of carriage.

**THE COMMISSION'S THEORY OF SECTION 2 IS AT VARIANCE,
NOT ONLY WITH ALL THE DECISIONS OF THIS COURT
AS TO THAT SECTION, BUT WITH THE REPEATED
DECLARATIONS OF THIS COURT AS TO THE SCOPE AND
PURPOSE OF THE ACT TO REGULATE COMMERCE.**

There is no better way to show the settled view of this Court as to the spirit and purpose of the Act to Regulate Commerce than to call attention to the fact that besides affirming Judge JACKSON's decision in the B. & O. party rate case and afterwards adopting substantially the same view of the law in the Import Rate Case, *this Court has in four other cases, adopted the following declaration by Judge Jackson as to the spirit and purpose of the Act:*

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits" (43 Fed., 50).

This language has been quoted with approval by this Court in the following cases:

C. N. O. & T. P. Ry. Co. vs. Interstate Com. Comm., 162 U. S., 184, 197 ;
 Interstate Com. Comm. vs. Alabama Midland R. R. Co., 168 U. S., 144, 172 ;
 Southern Pacific Company vs. Interstate Com. Comm., 200 U. S., 536, 554 ;
 Interstate Com. Comm. vs. Chicago Great Western Ry. Co., 201 U. S., 108, 119.

It is utterly inconsistent with this doctrine as to the general spirit of the Act to contend that no difference in rates may be made under Section 2, except such difference as can be justified by a difference in the circumstances of carriage.

It results that the Commission's theory of the two "simple tests" or character of the goods and destination of the shipment are utterly at variance with the meaning of Section 2 which must be drawn from the language of that section from the decisions of this Court upon that section and from the declarations of this Court as to the spirit and purpose of the Act.

It is Highly Important that the Established Liberal Construction of Section 2 Should be Adhered to so as to Preserve Numerous Important Kinds of Traffic.

We cannot emphasize too strongly that adherence to the present broad and liberal construction of the meaning and spirit of the Act to Regulate Commerce is of the highest importance from the standpoint of public interest and from the standpoint of the fair interest of the railroad owners.

We shall point out some of the important sorts of traffic which are involved and which may be seriously prejudiced by the narrowing of the doctrine as to the meaning of Section 2.

MILLING IN TRANSIT ARRANGEMENTS.

Chairman Knapp points out (*Trans.*, p. 44) that it will be extremely difficult to explain upon the Commission's theory the lawfulness of the milling in transit rate from the milling point to final destination.

Milling in transit arrangements prevail in many parts of the country and as to many important industries. Under such an arrangement, where a factory receives raw materials over a given railroad, that railroad gives a less rate on the shipment from that factory of the product made from that raw material than is given on a shipment from the same place to the same destination of a similar article not so made. A recognition and an extension of this principle by the Commission is found in the case of *Hecker-Jones-Jewell Milling Co. vs. Baltimore & O. R. Co.*, 14 I. C. C. R., 356.

With respect to every shipment under a milling in transit arrangement the Commission's two "simple tests" would require the same rate as for any other shipment of a similar article to the same destination. It would be a serious question whether any modification of the present liberal construction of Section 2 would admit of the continuance of this practice which is of such vital importance to industries throughout the country.

PROPORTIONAL RATES.

Chairman Knapp also points out (*Trans.*, p. 44) that proportional rates cannot be justified upon the basis of the Commission's ruling. A proportional rate means a less rate from a given point to a given destination than the ordinary rate applicable for that haul, and is generally given in view of the fact that the shipment to which such proportional rate is applicable has come from some designated place

although those rate adjustments have been recognized as proper for twenty years under that section, and although there has been no amendment to that section and no change in its construction by this Court.

In April, 1907, twenty years after the Act to Regulate Commerce was adopted, the Commission held that party rate tickets could not be limited to organized parties whose travel tended to develop other business for the railroad companies, but must be extended to all parties of the same size, regardless of the effect upon the business of the railroad companies, and justified this by the statement that under the holding of our courts "Section 2 prescribes a rigid rule of action." The Commission's opinion in this case will be found in the transcript at page 98. Commissioner HARLAN's dissenting opinion will be found in transcript on page 106.

COMMUTATION TICKETS FOR SCHOOL CHILDREN.

A further illustration of this tendency on the part of the Commission is afforded by its report "In the Matter of Regulations Governing Sale of Commutation Tickets to School Children," 17 I. C. C. Reports, 144. In that case the Commission, upon the authority of its Party Rate case, condemns the long-established and very general practice of selling monthly tickets to school children at rates less than the rates charged for monthly tickets in general, upon the ground that the sale of such tickets constitutes a violation of Section 2.

While holding that the sale of such school tickets would violate Section 2, the Commission suggests that it would be lawful to sell a monthly ticket at a specially low rate and limit its use "to children or young persons between certain stated ages (as, for instance, from twelve to twenty-one years of age)."

Thus, the Commission holds that the transportation of a person twenty-one years of age for less than is charged for a person twenty-two years of age does not violate Section 2, while the transportation of school children at rates lower than are charged other persons does violate Section 2.

This ruling illustrates the illogical results to which the Commission is brought by the application of its own theory. A substantial traffic distinction, almost universally acted upon for many years, is put aside, but in its place a wholly unsubstantial and theoretical distinction is permitted.

In this connection it is interesting to note that the Public Service Commission for the Second District of the State of New York, in construing provisions of the Public Service Law of that State similar to Section 2 of the Interstate Commerce Act, has taken an exactly opposite view of this situation:

"The general practice of carriers is to make half rates for all children under twelve years of age when traveling for any purpose, and the school commutation ticket is as a rule limited to those children attending public schools, or private schools having similar grades. Confined within these reasonable limits, and thus avoiding discrimination in affording rates and transportation facilities as between adult persons, it is impossible to perceive how the practice of allowing special rates for the transportation of children to and from school can produce wrongful discrimination or violate in any sense the equality clauses of the law." *In the matter of Reduced Transportation Rates to School Children*, decided October 28, 1907.

RATES TO PROMOTE MANUFACTURING SUSTAINED BY THE STATE COURTS ON REASONING IN LINE WITH THE DECISIONS OF THIS COURT, BUT INCONSISTENT WITH THE POSITION OF THE COMMISSION.

The following decisions of State courts afford further illustrations of legitimate rate adjustments which may be in the interest of the public and of the railroad companies, but which could not exist under the Commission's construction of Section 2. The cases are also of interest as further illustrations of the judicial attitude of courts towards statutes similar to Section 2 of the Act of Regulate Commerce.

In *Hoover vs. Railroad Company*, 156 Pennsylvania State, 222, an action was brought against the defendant company for damages for a violation of a statute prohibiting a railroad company from charging for the transportation of property "a greater sum than it shall charge or receive from any other person, company, or corporation, for a like service from the same place upon like conditions and under similar circumstances," the alleged violation being that the carrier charged less for transporting coal to manufacturing establishments than for transporting coal to a coal dealer.

The Supreme Court reversed the judgment of the lower court, and said :

"The ruling of the court below would require that coal carried to blast furnaces, rolling mills, rail mills, foundries and all other manufacturing enterprises should be carried for the same price as the coal carried to any retail dealer in the same locality, though the quantity consumed by the former might extend to many thousands of tons each year, while the quantity carried for the latter might be a few hundred tons only, and although the manufacturing companies gave back to the carrier many thousands of tons of freight each year, while the retail dealer gave back none, and although the business of the manufacturer in no wise competes with the business of

the dealer. We think the differences in these respects between these two kinds of business are such as to justify a discrimination in the rates of freight charged to each, and the conditions of the two are not alike and their circumstances are not similar within the meaning of our act of 1883, and therefore there can be no recovery in this case" (page 242).

A similar state of facts came before the Court of Appeals of Kentucky in the case of *L. & N. R. Co. vs. The Commonwealth*, 57 S. W., 508. In this case it was claimed that the rate adjustment violated Section 215 of the Constitution of Kentucky which provides that

"All railway, transfer, belt lines or railway bridge companies shall receive, load, transfer and haul, deliver and handle freight of the same class for all persons, associations or corporations, from and to the same point and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

The Court stated that the railroad company claimed that the different rates were justified because of the difference in volume of the two sorts of traffic, because the company received from the manufacturing establishment a traffic in other raw materials and also in manufactured products, and because the coal dealer who paid the higher rate, was not in competition with the manufacturer.

The court said :

"In considering these grounds, while we have stated them separately, it is, of course apparent that each and every element that enters into the business of transportation has to be taken into the account, and the result as a whole is to be considered in determining whether the conditions of particular transportation are the same, or are substantially the same" (p. 511).

A somewhat similar situation is referred to in the dissenting opinion of Judge BAKER in the case of *Chicago, etc., Ry. Co. vs. Interstate Commerce Commission*, 171 Fed., 680, 692.

" While cost of service must not be lost sight of in any system of rate-making, in the American system the prime factor has been the character of the merchandise and the volume of the traffic therein. That is, the prime factor has been the value of the service to commerce rather than the cost of the service to the carrier. In other words, the prime factor has been to charge what the traffic will bear; that is, not to charge what the traffic will not bear. For example, the discovery of natural gas in Indiana led to the establishment of steel, glass, and tin-plate mills, which could be operated profitably on account of the cheap fuel. When the natural gas failed, those mills would have been compelled to quit on account of the high cost of transporting their manufacturing materials, if they had not obtained very cheap fuel. *The traffic managers of the railroads considered the situation and greatly reduced the rates on coal consigned to those mills, while maintaining the old rates on the very same kind of coal from the very same fields to other consumers in whose cases the carrier's cost of the transportation service was the same.* The Indiana Railroad Commission held this not to be an unjust discrimination. This illustration gives a glimpse of the statesmanlike breadth of vision which traffic managers have quite generally employed in building up and maintaining the commerce of the country (and thereby the ultimate interests of their companies)."

The Commission's Order Was Unlawful Because Resting Upon an Erroneous Construction of Section 2.

The Commission by virtue of its erroneous construction of Section 2 has excluded from consideration all elements that enter into the making of the rules which the Commission has ordered stricken from the Classification. This is not a situation where the Commission has considered these elements on their own merits, and has rejected them because not sufficient to justify the rules from a legitimate traffic standpoint. The Commission has absolutely refused to consider these elements at all.

THE COMMISSION ERRONEOUSLY EXCLUDED ALL THE GENERAL
CONSIDERATIONS APPROVED BY THIS COURT IN THE
PARTY RATE CASE AND THE IMPORT RATE CASE.

Under Section 2 it was the duty of the Commission to consider, in the light of all legitimate rate-making factors and from the standpoints of the general public and of the fair interest of the carrier, and in the light of the fact that there was no competitive relation existing between the forwarding agent and the individual shipper, the questions whether the services were "like," whether the two transactions involved "a like kind of traffic," and whether the two transactions were characterized by "substantially similar circumstances and conditions."

In such inquiry the Commission ought to have considered all the differentiating factors which we have pointed out. In the light of those factors the services are not "like services", do not involve "a like kind of traffic", and are not characterized by "substantially similar circumstances and conditions". There is no competitive relation whatever between the forwarding agent on the one hand and the individual shipper on the other hand to create that "substantial identity of situation" which this Court held in Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., 263, must exist in order to justify a comparison under Section 2. The "fair interest of the carrier" justifies the rules. Public interest in publicity and uniformity of rates requires the rules.

It must be remembered that even if the Commission should be sustained in its view that this Court by the Wight case narrowed the construction of Section 2, as declared by the Court in the Party Rate Case and in the Import Rate Case, nevertheless the Wight case was confined to a situation where the questions as to the likeness of the services and as to the likeness of the kinds of traffic were

settled by the carriers' schedules themselves. Even the Commission's theory of that case as restricting the meaning of the clause "substantially similar circumstances and conditions" does not justify the Commission in excluding absolutely from consideration factors having a substantial bearing upon the questions of the likeness of the service and the likeness of the kinds of traffic.

BUT EVEN IF ALL QUESTIONS ARISING UNDER SECTION 2
MUST BE RESTRICTED TO "CIRCUMSTANCES OF CARRIAGE" PRACTICALLY ALL THE CONSIDERATIONS URGED
BY THE RAILROAD COMPANIES ARE SUCH CIRCUMSTANCES
IN THE REASONABLE MEANING OF THAT TERM.

But if Section 2 should be construed so that only "circumstances of carriage" can be considered in determining what is "a like service," what is "a like kind of traffic," and what are "substantially similar circumstances and conditions," we submit that it is still true that in any reasonable sense the differentiating circumstances which we have pointed out are circumstances of carriage.

There has never been any definition by this Court as to the meaning of the expression "circumstances of carriage." The phrase itself does not necessarily imply that it is restricted in meaning to the mere physical aspects of transportation. As we have already pointed out the English cases as to the meaning of "circumstances of carriage" are not applicable and have never been recognized by this Court as applicable to Section 2 of our Act. Section 2 does not use the expression "carriage" at all. It does use the expression "transportation". At the very least the expression "circumstances and conditions" in Section 2 must mean "circumstances and conditions of transportation." There is no reason why such a phrase should be regarded as restricted in its meaning to the mere physical aspects of

the transportation service. The term "transportation", when applied to the railroad business, is regarded as having a broader meaning. We submit that any circumstance having a reasonably clear and direct relation to the transportation business of a railroad company should be regarded as a "circumstance or condition of transportation" within the meaning of Section 2. If so, we submit that the differentiating factors established in this case were entitled to consideration in order to determine whether they were substantial from a transportation standpoint. But they were absolutely excluded from any consideration by the Commission.

Even the construction of the English Equality Clause recognizes that a circumstance affecting the cost of transportation is a circumstance which ought to be considered in determining whether a difference of rates is permissible under that section. What is the underlying reason for the universal acquiescence in the proposition that the cost of transportation may be a differentiating circumstance? Clearly the cost of transportation is not the object for which a railroad company operates its property. Railroad properties are built and operated in order to derive a profit from the employment of the invested capital. All tribunals look to the cost of transportation service simply as a means of considering the question whether there is a profit to the railroad company, and they do this because it is recognized that anything which has a substantial bearing upon the profits of a railroad company is a circumstance which in the nature of things is entitled to be considered in adjusting rates. The underlying idea is that a discrimination is not arbitrary or for the purpose of favoritism if it is justly based upon a factor having a direct relation to the profit derived by the railroad company from conducting its regular business.

The proposition that the forwarding agents operate at the expense of the railroad companies and diminish the profits of the latter, leaving the latter still in a position where they must maintain practically undiminished the facilities for handling the less than carload business which the forwarding agents seek to step in and take has a direct and legitimate relation to the rules which were condemned by the Commission in this case and the question of profits from railroad operation. Does not the same philosophy which permits a consideration of the cost of transportation in order to view the question of profit to the company permit a consideration of the direct effect upon the profit of the company which would result from the intervention of the forwarding agents?

We submit that in the strictest sense the very fact of competition between the forwarding agent and the railroad company and the consequent diminution of the latter's revenue is a circumstance of transportation within the meaning of Section 2 of our Act.

In the same way practically all the elements urged on behalf of the railroad companies and appearing in the record are in a direct and substantial sense legitimate transportation considerations.

THE PHRASE "CIRCUMSTANCE OF CARRIAGE," EVEN IF CONFINED TO THE IMMEDIATE PHYSICAL ASPECT OF THE CARRIAGE, JUSTIFIED A CONSIDERATION BY THE COMMISSION OF MANY OF THE ELEMENTS SHOWN BY THE RAILROAD COMPANY.

But if we come down to the mere physical aspect of the two transportation services we find that the Commission was still in error and excluded absolutely from consideration elements shown in the record and having a direct and necessary relation to the physical aspect of the transportation service.

We again call the Court's attention to our analysis (*supra*, pp. 46, 47) of the Commission's theory of the law in this case ; that theory was that compliance with Section 2 must be determined by two " simple tests " (a) the character of the goods, and (b) the destination of the shipment. Not only does the Commission expressly say this, but its dealing with the case shows that it proceeded on this theory. The Commission took the position that there was no element in this case to distinguish it in any respect from the Wells-Fargo Express case. In taking this position the Commission necessarily ignored every element set forth in this case which did not exist in the Express case. The Express case did not involve any question of carloads and less than carloads, or of shipments loaded into the car by the shipper as compared with shipments loaded into the car by the carrier. The Express case was confined merely to " bulked packages " which in any event had to be handled by the Express Company. On the contrary the case at bar involved among other things a comparison between the time of loading cars by forwarding agents and the time of loading cars by the shipping public generally. The evidence of Mr. Caldwell was emphatic that delay in loading cars by ordinary shippers was very unusual, but that delay in loading cars by forwarding agents was the rule and promptness was the exception (*supra*, pp. 14, 15). This evidence related to Official Classification territory and to the thousands of commodities which to some extent in the past had been the subject of consolidations by forwarding agents in that territory. There was virtually no dispute upon this proposition, although gentlemen engaged as experts in forwarding four or five special lines of business in Western Classification territory testified that there was no delay on their part in loading. This was a circumstance relating directly to the physical aspect of transportation and a circum-

stance which could not exist in the Wells-Fargo case, yet the Commission made no reference to it; did not decide the fact against Mr. Caldwell's evidence, but simply ignored the proposition altogether. This was in accord with their theory of the two "simple tests" because neither of those tests was broad enough to cover this question.

Apparently the Commission's view is that the "circumstance of carriage" must be construed so narrowly as to apply only to some circumstance whose existence is necessarily demonstrable with respect to any specific carload under consideration; and that a general condition, which on an average applies to all shipments of a class of shippers, cannot be considered at all since of course there would always be a possibility that such general condition would not apply in any given case. Apparently because delay in loading does not inhere in the physical character of the goods loaded in each particular car, the Commission refuses to consider a general situation in which on an average the delay is much greater as to forwarding agents than it is as to shippers in general.

Similar observations apply to the showing made as to greater liability to breakage on account of combination by a forwarding agent of miscellaneous commodities in a single car and as to the greater probability of false billing and misrepresentation by forwarding agents. (The evidence on these points as to conditions prevailing in Western Classification Territory, where there were comparatively few forwarders who were embraced in the restricted lines of business in which they could operate in that territory, has no substantial bearing upon the very different situation prevailing in Official Classification Territory; and as to that the evidence on behalf of the Railroad Companies was substantially unchallenged.) The Commission's theory, however, seemed to be that as there would be no difference in these respects between a forwarding agent and an ordinary

shipper, if the ordinary shipper wished to combine as many different articles, or wished to evade the law by misrepresentation, therefore there was no difference between the two situations which could be considered. This theory ignored entirely the fact that on an average the probability of difficulty in these directions is much greater with respect to the forwarding agent than with respect to the ordinary shipper. Clearly such factors are circumstances of carriage even if they are not embraced by the Commission's two "simple tests."

IN THE LUNDQUIST CASE THE CIRCUIT COURT HELD THAT THE LIABILITY TO A MULTIPLICITY OF ACTIONS WAS A SUFFICIENT DIFFERENTIATING CIRCUMSTANCE.

In *Lundquist vs. Grand Trunk Western Ry. Co.*, 121 Fed. Rep., 915, the Circuit Court for the Northern District of Illinois after stating that the points (*a*) that railroad companies ought not to be compelled to allow a forwarding agent to deprive them of their less than carload business and (*b*) that such a course would tend to defeat the spirit of the Interstate Commerce Act, were entitled to consideration, then considered the proposition that with respect to shipments by forwarding agents the railroad companies were exposed to the expense and annoyance of a multiplicity of suits by the various beneficial owners without the additional compensation provided for in their less than carload rates, and said :

" Is the service demanded by complainants, all the circumstances and conditions considered, a like and contemporaneous service in the transportation of a like kind of traffic under similar circumstances and conditions to those offered by defendants to an owner of goods, as distinguished from a forwarding agent representing several owners ? It must be admitted

that the carrier is, in the case of numerous beneficial owners, subjected to an additional liability, which it is entitled to provide against by an increased rate. There is some uncertainty as to whether or not the carrier could, in cases like the one before the court, be held liable to the beneficial owner upon the contract of the forwarding agent, but there is no doubt but that it can be pursued in tort. It is, of course, impossible to determine the actual extent of the liability thus assumed; but it is appreciable, and quite sufficient, in my judgment, when taken with the foregoing, to differentiate it from the car-load service furnished to owners, as distinguished from forwarding agents representing different owners, and therefore the case at bar does not come within the terms of the interstate commerce act relied upon by complainants. In England this increased liability has been ignored in suits brought under the railway causes act. That act is much more explicit in its terms than the interstate commerce act. The peculiar language of the former is that 'all tolls shall be charged equal to all persons and after the same rate.' But even were this not the case, it is not probable that our courts would feel bound to follow the English decisions. The conditions surrounding the operation and managements of railroads covering such a small territory as that of England are so different from those existing in this country, and the demands upon the carrier service are so divergent, that English decisions should not be allowed to control. The trend of the American decisions and the official utterances of the Interstate Commerce Commission all recognize the principle that the particular facts of each case must have great weight in the application of the provisions of the interstate commerce act" (pp. 917, 918).

It is Economically Inexpedient from the Public Standpoint to Develop a Class of Intercepting Carriers in this Country.

Upon this proposition we quote the following from the Fourth Annual Report of the Commission with respect to ticket scalpers. We submit that there is no substantial

difference from the general economic standpoint between ticket scalpers and forwarding agents or freight scalpers :

" From various reports received by the Commission it appears that in New York City there exist thirteen scalping offices, in which including proprietors and clerks, about thirty persons are employed, at an estimated expense for office rent and clerk hire of \$20,000 to \$25,000 a year, and with an estimated annual profit from the business of \$90,000 to \$100,000 ; that at Chicago there are fifteen scalping offices, whose combined annual expense for rent and clerk hire amounts to about \$70,000 ; that at Cincinnati there are nine scalping offices, with an annual expense for rent and clerk hire of about \$20,000 ; and that at Kansas City there are seven scalping offices, with an estimated annual expense for rent and clerk hire of about \$18,000. When it is considered that this business is carried on in nearly all the principal cities of the country, and that the net profits probably amount to four times the expenditure for carrying it on, it is evident that the profits from this illegitimate business exceed the sum of a million dollars annually.

The ticket broker has no necessary, useful or legitimate function. He is a self-constituted middleman between the railroad and the passenger. All railroads have accessible and convenient offices and agents for the sale of tickets. The public can be fully accommodated by the regular agencies of the roads without the intervention of superfluous and obtrusive middlemen.

As there could be no field of operation for this class of persons if the railroad companies obtained full established rates for all transportation furnished by them, *the expenses of the business and the profits made by those who conduct it must necessarily in the first instance come out of the carriers,* and represent simply the discount suffered by them from their established fares and the resulting diminution of revenue. *But indirectly this diminution of revenue is made up by the public,* for while the carriers have it in mind in making their rates, and charge higher rates than would be necessary for fairly remunerative revenue if there were no such drain upon them to support the auxiliary force of scalpers (Fourth Annual Report Interstate Commerce Commission, p. 50).

To the same effect and pertaining directly to forwarding agents is the following language from the dissenting opinion of Commissioner KNAPP :

" Certain economic considerations are here suggested by the record in these cases. In our present state of industrial development the interchange of commodities involves two necessary factors—a person offering goods for shipment and a carrier transporting the goods so offered. The former finds his compensation in the production and sale of commodities, the latter in their carriage. Generally, then, the cost of a commodity at the place of consumption will be the sum of the cost of production and the cost of transportation ; and any additional cost must result from the presence of another factor which is unnecessary and, from an economic standpoint, unwarranted. *The intervention of the middleman, in this case the forwarding agent, means another person who must make his living out of the transportation. In the last analysis the consuming public must support the carrier and the forwarding agent in place of the carrier alone.* Nor does it answer this to say that the forwarding agent actually decreases the aggregate expense because the goods are carried to destination for less than would have been paid if the several shipments had been forwarded at the less than carload rates. The real significance of this contention is that the carload and less than carload rates do not bear a proper relation to each other, if the forwarding agent can be supported and the shipper at the same time make a profit out of the difference between the rates. Obviously, the forwarding agent does not desire to do away with the present system of carload and less than carload rates, nor to reduce the difference between them, for the greater the difference the wider is his opportunity. His real object is not to secure a readjustment of rates which shall more accurately measure the carriage of carloads and less than carloads, much less to remove the differences based upon quantity, but to secure the right to carry on a 'bargain counter' business under existing conditions " (Trans., p. 31).

It will be remembered that the reasoning and conclusions of Commissioner Knapp were adopted by the Circuit Court. To the same effect also is the following language from

dissenting opinion of Commissioner HARLAN in the Wells Fargo case:

"To give to forwarders the status and the rights of shippers is to make the business of forwarding a permanent feature in our commerce. This is to be regretted, not only because there seems to be no real general need of forwarders in this country, but because no advantage can come through them to the general public. Some shippers may in that way get lower rates than they now enjoy, but to the general shipping public the result cannot be other than disadvantageous. Anything that tends to increase the bulked shipments of express companies tends to diminish their revenues, and as a consequence to require a readjustment of their rates. As was well stated on the argument, *it is not economically a sound proposition to interpose a new factor in transportation between the shipper and the carrier, a middleman who must make his living out of transportation.* While the immediate result of this decision may be to enable the forwarder to carry on his business at the expense of the revenue of the carrier, the ultimate result will be to require the shipping public to support both the carrier and the forwarder"

(Trans., p. 64).

It seems unnecessary to add upon this point anything the foregoing comments.

The Business of the Forwarding Agents is Subversive of the Spirit and Purpose of the Act to Regulate Commerce and Would Tend to Nullify its Most Important Provisions.

Upon this point we quote the following from the Fourth Annual Report of the Commission relative to ticket scalpers. We think the language equally applicable to freight scalpers:

"It is urged by way of defense that through the ticket scalper a portion of the public get lower rates and therefore his operations are in the interests of the public. The circumstance that lower rates so ob-

tained are forbidden by the fundamental principle of the law, that equality of charges for equality of service shall be made, and that such rates are unjust discrimination, is wholly disregarded by this defense" (Fourth Annual Report Interstate Commerce Commission, p. 51).

We quote as follows from the dissenting opinion of Commissioner KNAPP:

"It is not only the right but the duty of the Commission to look through the form to the substance of a transaction. Courts and witnesses may sometimes be stopped in actions at law from considering or showing the real merits of a case by strict rules of evidence or pleading. But any such restriction upon the Commission would be against public policy, inasmuch as our decisions affect the shipping public and the carriers of the country generally, as well as the parties to a particular case. It is one of the best known and most universal rules of equity that the right of the party having the beneficial interest rather than the party holding the mere legal title shall be considered and enforced.

"Applying this principle to the present case, the real parties in interest are the carrier and the persons who desire to secure the transportation of less-than-carload freight. So long as each less-than-carload shipper is charged the published less-than-carload rate either directly or through the agent whom he employs to ship his freight, he certainly can make no claim of unjust discrimination under the most ironclad construction of section 2. *Viewed in this light, the elaborate argument of the forwarding agent fails to be in any degree convincing. He appears merely as a scalper of freight rates, a person who makes his living out of a scheme and device whereby his patrons secure transportation of less-than-carload shipments at rates less than those offered by the carriers' public tariff.*

"Indeed, it seems pertinent to inquire whether, if complainant's contention is correct, the publicity requirements of the act in respect of rates would not be virtually defeated. Clearly, the less-than-carload rates would not be those named in published tariffs, but such as might be agreed upon between the forwarding agent and the shipper. *And if the rates actually secured by less-than-carload shippers through*

the intervention of the forwarding agent are just as lawful, why should not the carrier be permitted to effect the same result by direct bargaining with the shipper? Can the same thing be lawful when done by the forwarder and a punishable offense when done by the carrier?" (Trans., p. 46).

Upon this point we quote as follows from the opinion of the Circuit Court in *Lundquist vs. Grand Trunk Western Ry.* v., 121 Fed. Rep., 915:

"The difference between the car-load and less than car-load rates placed at the disposal of the forwarding agent may easily be so manipulated by him as to defeat the spirit of the interstate commerce act. He is not subject to the provisions of that act. Manifestly, he may evade the very provisions of the act which he is claiming the defendants are defeating in this case. He can offer different rates to different shippers, with no other limit than business necessity. Not only this, but he can give his principals lower rates than those given by defendants to their less than car-load shippers. The logical outcome of such a condition would be, according to the inexorable rules of commerce, that defendants would be obliged either to do an injustice to their shippers of less than car-load lots, or reduce all their rates to a car-load basis. It seems to me that the two last-named objections go far toward the demonstration of the equity of defendants' position" (p. 917).

Section 6 of the Interstate Commerce Act reads as follows:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

Ssection 10 of the Interstate Commerce Act provides :

" Any common carrier subject to the provisions of this Act * * * who by any other device or means, shall knowingly and wilfully assist, or shall willingly suffer, or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor."

" Any person * * * who shall deliver property for transportation to any common carrier, * * * who shall knowingly and wilfully * * * by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor."

Section 1 of the Elkins Act contains the following :

" In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier or shipper as well as that of the person."

Also :

" Any person, corporation or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property [in Interstate Commerce] who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States, etc."

The classifications and tariffs of the railroads are filed with the Commission and have the binding force of a law of Congress upon both shipper and carrier.

T. & P. R. R. Co. vs. Abliene Oil Co., 204 U. S., 425.

Under the provisions of these classifications and tariffs, the filed less than carload rate is the legal charge to be paid by the shipper of less than carload quantities of freight, and the filed carload rate is the legal charge to be paid by the shipper of carload quantities of freight. Two units of shipment have been established and approved by the Commission and the Courts ; and two classes of shippers result. The purpose of the Act to Regulate Commerce is now to maintain equality among the shippers in one class, and among the shippers in the other. If the Act requires equality between the carload and less than carload shippers, it should be brought about in a direct proceeding to that end. It is not to be sought through a practice which, while it will tend to bring certain less than carload shippers closer to the carload rates, will not in any case equalize the two classes of shippers, and as to the great body of less than carload shippers will produce discriminations of greater variety and extent than have ever yet existed in the country.

The Commission and the Federal authorities have uniformly contended that it is the duty of the carrier and the duty of the Commission and Courts to look through the devices, schemes, agencies and means by which the real nature of transactions between shippers and carriers are sought to be hidden, to strike them down and expose the real nature of the transactions, and hold the parties to strict accountability therefor.

In the Milwaukee Refrigerator Transit Co. case, 142 Fed. Rep., 247, the Court inquired into and struck down, not a mere billing device, not a mere agency, but an elaborate

corporate organization which stood between the carrier and shipper.

We have hereinbefore pointed out that forwarding agents are not amenable to the Interstate Commerce Act, and we have discussed the discriminations that we believe must inevitably follow their general operation. Testimony of witnesses for the complainant before the Interstate Commerce Commission, has been quoted to confirm our statements. The conclusion cannot be escaped that such discriminations would inevitably result; that that which it is criminal under the act for the carriers or for shippers acting in their own name to do, would be permitted to shippers acting through forwarding agents.

The efficacy of Section 6 would be destroyed by the general operation of the forwarding agent. Probably one of the greatest benefits resulting from the Interstate Commerce Act is publicity and stability of rates. The business men of the country know not only what freight charges they themselves must pay, but what their competitors must pay, and can adjust their business dealings accordingly. If the forwarding agents were recognized generally this favorable condition would be done away with. Shippers would only know that they could obtain for their less than carload shipments rates somewhere between the less than carload and the carload rates. Just what they would have to pay they could not tell; certainly not what their competitors would have to pay. The same class of evils that existed when secret rates were quoted by the carriers, would again prevail.

In the light of the decisions hereinbefore quoted, that the Act to Regulate Commerce was intended primarily to establish equality between shippers and secure stability and publicity of rates, we submit that most compelling reasons for the abolishment of the rules in question should be advanced before such results are brought to pass. An order which, to

correct one alleged discrimination against the forwarding agent, throws wide the door to a multitude of discriminations among less than carload shippers, in comparison with which any possible existing discriminations arising from the enforcement of said rules would be trivial, and which destroys the very purpose of the Act and nullifies its plain provisions, we cannot believe to be required or justified by Section 2, or any other section of the Act.

In the Import Rate Case, 162 U. S., at page 22, the Court took occasion to point out that the effort of the Commission by a rigid construction of the Act to accomplish one purpose "seems to create the very mischief which it was one of the objects of the Act to remedy."

In E. T., V. & G. R. R. Co. vs. Interstate Commerce Commission, 181 U. S., 17, the Court took occasion to point out that the argument of the Commission involved the assumption that the Act to Regulate Commerce "at one and the same time expressly confers a right and yet specifically destroys it."

The present case affords another striking illustration of a situation where the Commission through a supposed effort to enforce a *theoretical* equality with respect to forwarding agents on the one hand and ordinary carload shippers on the other (between whom there is no competitive relation whatever) is adopting a course which would result in the most far-reaching inequality between competitive less than carload shippers.

If this can be accomplished we have an illustration of the statute "at one and the same time expressly conferring a right and yet specifically destroying it."

Counsel for the American Forwarding Company and the other forwarding agents appellants in this case makes the striking argument (p. 54 of his brief) that the forwarding agents must and will have uniform rates because "competition must make them so" and that discrimination "can-

not exist when exposed to the rough conditions of competition." The history of railroads in this country shows that the Act to Regulate Commerce grew out of the intolerable discriminations between shippers which resulted from railroad competition uncontrolled by law. We are not aware of any principle which would accomplish the two directly opposite results of unequal rates and unjust discriminations to competing shippers when railroad companies compete for the traffic and equal and uniform rates between competing shippers when forwarding agents compete for the traffic.

In the recent decision of the Supreme Court in Bitterman vs. L. & N. R. R. Co., 207 U. S., 205, this Court registered its condemnation of discriminations and transportation at less than tariff rates obtained by passengers dealing not with the carrier direct, but through the intervention of third parties. The entire opinion is illuminative of the spirit of the Interstate Commerce Act and the carriers' duty to enforce its real purpose by preventing evasions and impositions. We quote the following :

" And when the restrictions embodied in the act concerning equality of rates and the prohibitions against preferences are borne in mind the conclusion cannot be escaped that the right to issue tickets of the class referred to carried with it the duty on the carrier of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and therefore caused the non-transferable clause to be operative and effective against any one who wrongfully might attempt to use such tickets. *Any other view would cause the act to destroy itself*, since it would necessarily imply that the recognition of the power to issue reduced rate excursion tickets conveyed with it the right to disregard the prohibitions against preferences which it was one of the great purposes of the act to render efficacious. This must follow, since, if the return portion of the round-trip ticket be used by one not entitled to the ticket, and who otherwise would have had to pay the full one-way fare, the person so suc-

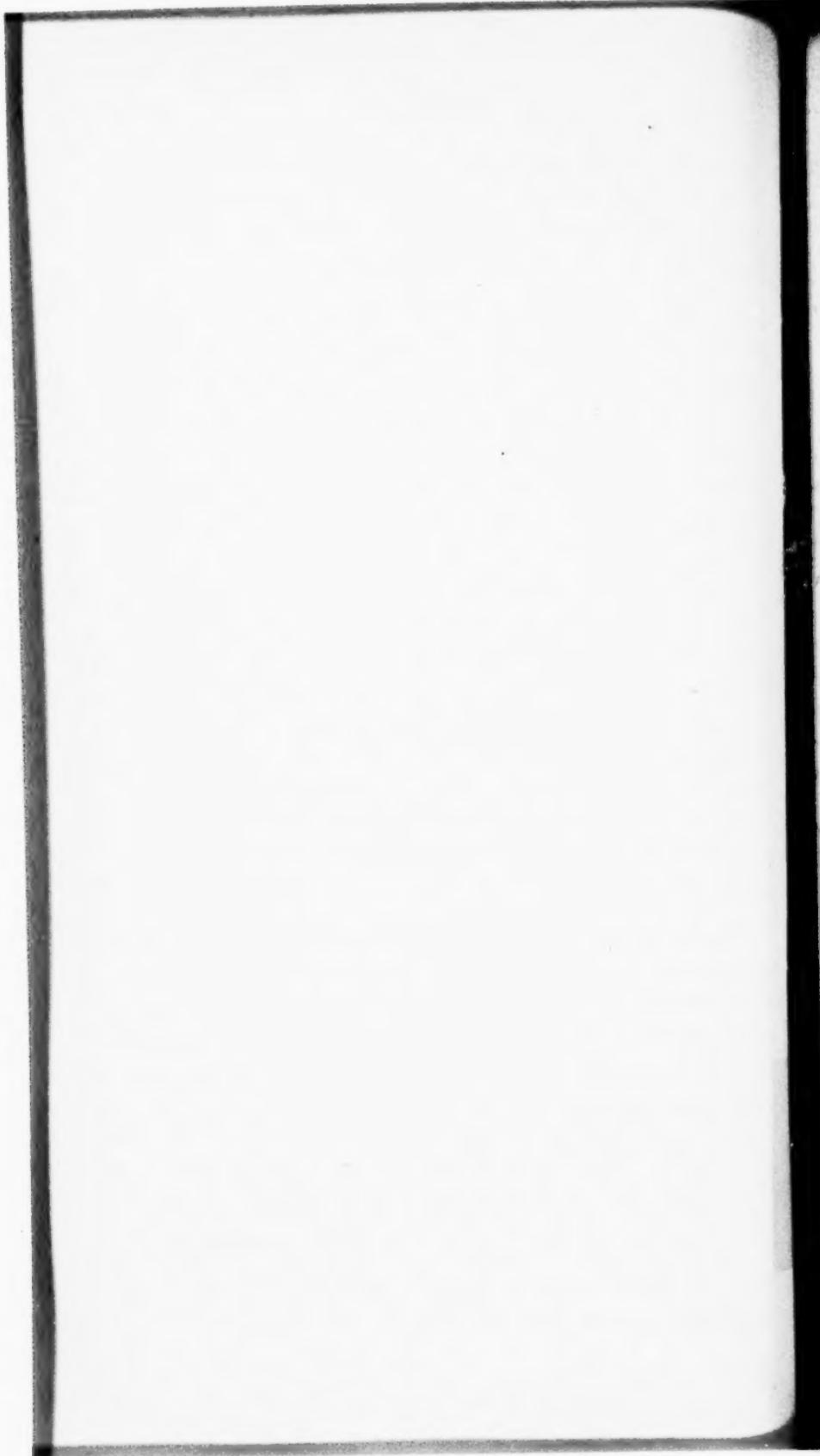
cessfully travelling on the ticket would not only defraud the carrier but effectually enjoy a preference over similar one-way travelers who had paid their full fare and who were unwilling to be participants in a fraud upon the railroad company" (p. 222).

In other words, this Court held that while carriers might issue reduced rate passenger transportation, it was their duty to see that such reduced rate transportation was used only by the persons and for the purposes on account of which it was issued, and that if the carriers knowingly permitted such reduced rate transportation to be used by other persons, or for other purposes than the same had been issued, they would be guilty of a violation of law.

We submit that the all important provisions of the Act to Regulate Commerce to secure publicity and equality of rates with respect to competing less than carload shippers will be seriously impaired if forwarding agents are permitted to intervene and control that portion of the railroad transportation service; that the Act ought not to be so construed as to destroy itself; and that therefore, aside from all other considerations, Section 2 ought to be so construed, if its language permits, as to avoid this self-destructive consequence.

The Commission's Order was Unlawful Because Resulting from an Erroneous Construction of the Law. Therefore the Decree of the Circuit Court in Enjoining the Defendants from the Enforcement of that Order was Correct and Should Be Affirmed.

Respectfully submitted,
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Counsel for Appellees.



NO. 825

Office Supreme Court,
WILLARD.
FEB 14 1910
JAMES H. MCKENN

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1909.

INTERSTATE COMMERCE COMMISSION, THE AMERICAN FORWARDING COMPANY, ET AL., *Appellants,*

vs.

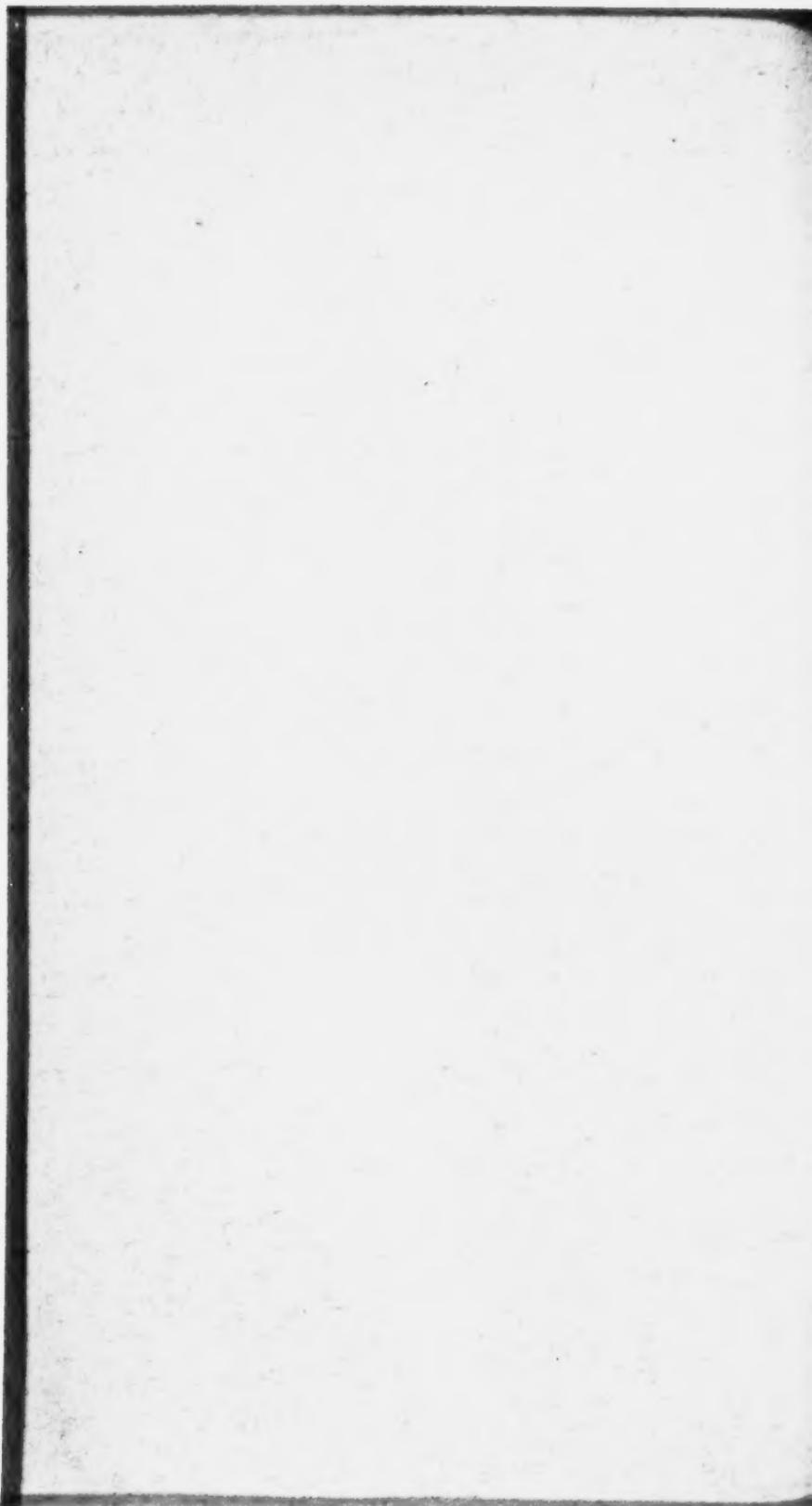
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, THE WABASH RAILROAD COMPANY, THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY AND THE BALTIMORE & OHIO RAILROAD COMPANY, *Appellees.*

Brief for Appellants, The American Forwarding Company, Transcontinental Freight Company, and Rockford Manufacturers and Shippers Association.

MAZZINI SLUSSER,

Attorney for said Appellants.

BARNARD & MILLER PRINT, CHICAGO.



IN THE
Supreme Court of the United States,
OCTOBER TERM, A. D. 1909.

INTERSTATE COMMERCE COMMISSION, THE
AMERICAN FORWARDING COMPANY ET AL.,
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vs.

THE DELAWARE, LACKAWANNA & WESTERN
RAILROAD COMPANY, THE WABASH RAIL-
ROAD COMPANY, THE NEW YORK, CHICAGO
& ST. LOUIS RAILROAD COMPANY, AND THE
BALTIMORE & OHIO RAILROAD COMPANY,
Appellees.

**Brief for Appellants, The American Forwarding
Company, Transcontinental Freight Company, and
Rockford Manufacturers and Shippers Association.**

STATEMENT OF CASE.

The order of the Interstate Commerce Commission, which was enjoined by the Circuit Court in this case, was entered by the Commission upon three complaints brought by the Export Shipping Company, a forwarding agent and commission merchant

of New York. These complaints were respectively against the Wabash Railroad Company *et al.*, New York, Chicago & St. Louis Railroad Company *et al.*, and the Baltimore & Ohio Railroad Company *et al.*, and were consolidated and heard as one complaint. The facts were that the complainant had assembled in the City of Chicago for shipment by railroad to New York, three carloads of merchandise, each made up of goods belonging to divers owners. The traffic in each car was shipped as an entirety under one bill of lading, by the Export Shipping Company as consignor, to itself as consignee, and under circumstances which entitled it to a carload rate, under the rules of the Official Classification, except that the beneficial ownership of the merchandise in each car was diversified. The several cars were tendered to the respective railroads for shipment to New York, under their carload rates. Upon the arrival of the several cars in New York, the railroads refused to apply the carload rates, but in accordance with note to Rule 5-B and Rule 15-E of the Official Classification, applied the less than carload rates. *This action of the railroads in applying the less than carload rates was taken solely because of the diversity of the beneficial ownership of the merchandise in the several cars.* The rules of the Official Classification pursuant to which the railroad companies applied their less than carload rates in said cases, are as follows:

"Rule 5-B:

"In order to entitle a shipment to the carload rate, the quantity of freight requisite un-

"Note—Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.

der the rules to secure such carload rate must be delivered at one forwarding station, in one working day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car service rules and charges of the forwarding railroad. (See note.)

"Railroad agents at forwarding points will not sign shipping receipts bearing the notation 'part carload lot' until shipping receipts for the whole carload have been presented and the freight received, in order that bill of lading may be obtained at the carload rate. Only one original bill of lading for the whole carload shall be issued. (See note.)

"Railroad agents at forwarding points will not receive property in carloads for distribution by railroad agents to two or more parties; delivering agents will deliver property only to consignee thereof or to the party presenting consignee's written order, and will not recognize orders from consignor or consignee providing for distribution of carload shipments among various consignees or calling for split deliveries according to brands, marks, sizes or other identification of packages, nor will railroad agents at delivering points in anyway act as the representative of the consignor or consignee for the distribution of carload shipments. (See note.)

"Rule 15-E:

"Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be way-billed as separate shipments and freight charged accordingly. (See note.)

"Note—The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property of, or any party interested in the combination l. c. l. shipments of articles from several consignors at point of origin."

The three complaints as consolidated were heard before the Chairman of the Interstate Commerce Commission on the 20th day of October, 1907. On the 6th day of December, 1907, THE AMERICAN FORWARDING COMPANY and the TRANS-CONTINENTAL FREIGHT COMPANY, with the consent of the Commission, filed an intervening petition showing their interest as forwarding agents and shippers in the subject matter of the proceeding. The complaints and the intervening petition as amended challenged the foot-note to Rule 5-B and Rule 15-E with its foot-note, above referred to, as being in contravention of the provisions of the Act to Regulate Commerce.

The case was opened for further hearing, and, on the 20th day of December, 1907, the interveners produced and offered in evidence, before the Honorable Martin A. Knapp, Chairman of the Commission, testimony in support of the contention of the interveners, that the physical conditions of carriage of merchandise belonging to divers owners, assembled and shipped by railroad, by forwarding agents and others, under one bill of lading, by one consignor to one consignee are not substantially dissimilar from the shipment of like merchandise where the beneficial ownership of the entire carload is vested in either the consignor or the consignee.

This testimony under the stipulation of parties, is part of the record in this case, and is referred to and commented on in this brief.

The case was afterwards argued orally before four commissioners, and on the 22d day of June, 1908, the Interstate Commerce Commission entered its order in said proceeding, which among other

things required the respective railroads, parties to said proceeding, to strike out, omit and cease from enforcing as regards transportation, subject to the Act to Regulate Commerce, said note to Rule 5-B and Rule 15-E, appearing in the Official Classification; also requiring said railroads to cease and desist from refusing to apply their carload rates to the transportation, subject to the Act to Regulate Commerce, of carload lots consisting of packages of various ownership, tendered as a single shipment by one consignor to one consignee, also requiring the said railroads to desist from making ownership or lack of ownership of property presented to them for transportation, subject to the Act to Regulate Commerce, the test of the applicability to said transportation of said property of any of their rates whatsoever.

The appellees in this suit were parties to said proceeding before the Commission, and instituted this suit in the Circuit Court to enjoin the enforcement of said ~~order~~ ^{order} decree. The Circuit Court, upon the record, and without the taking of testimony, entered a decree enjoining the Commission and the complainants from enforcing said order. After the hearing in the Circuit Court was had, The American Forwarding Company, the Trans-Continental Freight Company, and Rockford Manufacturers, and Shippers' Association, three of the appellants herein, filed their intervening petition in the Circuit Court, and, upon request of the Commission (Rec., 299, 300), were made parties to the record. From the decree of the Circuit Court the appeal to this

Note—The said appellants, The American Forwarding Company, the Trans-Continental Freight Company and Rockford Manufacturers and Shippers Association are referred to in this brief as Interveners.

court was taken, under the provisions of the Act to Regulate Commerce.

The question which must determine this case, is whether or not the foot-note to Rule 5-B and Rule 15-E with its foot-note, of the Official Classification as quoted above, are unjustly discriminatory, unjust, unfair and unreasonable in this: that they provide that the railroad carriers shall collect a greater compensation from certain persons for the transportation of property subject to the Act to Regulate Commerce, than the said carriers collect from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

Said rules and foot-notes are, as we conceive, to be tested under Section 2 of the Act to Regulate Commerce, which provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

SPECIFICATION OF ERRORS.

- I. The said Circuit Court erred in not dismissing the complaint for want of jurisdiction.
- II. Said Circuit Court erred in not dismissing the complaint for want of equity.
- III. Said Circuit Court erred in holding that note to 5-B and rule 15-E were lawful rules or regulations.
- IV. Said Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled previous to the time when it was offered to the carrier for transportation at point of origin, in determining whether or not the carload shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially similar to the circumstances and conditions pertaining to the transportation by the carrier of the carload shipments which were owned entirely by either the consignor or the consignee.
- V. Said Circuit Court erred in holding that it was proper to consider how and by whom the traffic was handled subsequent to the time when it was delivered by the carrier to the consignee at point of destination, in determining whether or not the carload shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially similar to the circumstances and condi-

tions pertaining to the transportation by the carrier of the carload shipments which were owned entirely by either the consignor or the consignee.

VI. Said Circuit Court erred in holding that a bailee for hire of merchandise when he tenders traffic to a carrier for transportation from a point in one state to a point in another state is not a person within the meaning of Section 2 of the Act to Regulate Commerce.

VII. Said Circuit Court erred in holding that as a matter of law the shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially dissimilar from the circumstances and conditions pertaining to the transportation by the carrier of the shipments which were entirely owned by either the consignor or the consignee.

VIII. Said Circuit Court erred in holding that as a matter of fact the shipments in which the beneficial ownership was not vested entirely in either the consignor or the consignee were transported by the carrier under circumstances and conditions which were substantially dissimilar from the circumstances and conditions pertaining to the transportation by the carrier of the shipments which were entirely owned by either the consignor or the consignee.

BRIEF.

I.

A FORWARDING AGENT,* HAVING POSSESSION OF GOODS WITH THE RIGHT TO SHIP THE SAME, IS A "PERSON" WITHIN THE MEANING OF SECTION 2 OF THE ACT TO REGULATE COMMERCE.

(a) A forwarding agent which for a consideration receives goods into its possession with directions from the owner thereof to ship the same, is a bailee for hire, and has a special property in the goods, investing it with the same authority and right of shipment as possessed by such owner.

Great Western R. R. Co. v. McComas, 33 Ill. 186.

Edgerton v. Chi., R. I. & Pac. Ry. Co., 240 Ill. 311.

Story on Bailments, 9th Ed., Par. 444.

Bush v. Miller, 13 Barb. 481.

Freeman v. Birch, 28 Eng. Com. L. Rep. 326 (1 Neville & Manning).

(b) Any such forwarding agent having the right to ship goods, and tendering the same for shipment to a common carrier is a "shipper" in contemplation of law whom the carrier is bound to serve and

*Note—For convenience in this brief, the term forwarding agents is used to include forwarding companies proper, bailees, shipping associations and all other agencies whatsoever having possession of merchandise for shipment by railroad, the beneficial ownership of which merchandise is vested in other persons.

a "person" within the meaning of Section 2 of the Act to Regulate Commerce.

A. T. & S. F. R. R. Co. v. D. & N. O. R. Co.,
110 U. S. 667, 683.

*Shelbyville Railroad Co. v. Louisville, Cinn.
& L. R. R. Co.*, 82 Ky. 541, 545.

Hedding v. Gallagher, 72 N. H. 377, 382.

Parker v. Great Western R. R. Co., 7 M. &
G. (49 E. C. L. Rep.) 252, 291, 292.

Great Western Railway Co. v. Sutton, Law
Rep., 4 Eng. & Irish App. 226.

It is with somewhat of an apology to this Honorable Court that we argue the points made under this heading. We had not supposed that any of the propositions there advanced would be seriously controverted. The following statement appearing in Subdivision A, Section 11, of the bill for injunction upon which this proceeding is based (Rec., 14) must be our excuse for so doing:

"The forwarding agent is not a 'person' within the definition of said Section 2. On the contrary, it is an independent shipping agency or common carrier, and as such seeks to use the facilities and equipment of your orators."

We feel confident that counsel for appellees will not deny to the owner of goods the right to delegate to some third person the matter of shipping his goods by carrier and the right to deliver possession of his goods to such third person with such purpose in view, and we suppose it will be granted that the resulting relation is one of bailment and the person receiving such goods for shipment a bailee for hire with a special property in such goods and the right to ship the same. A cursory consideration of

the elementary principles of the law of bailments must lead to these conclusions.

We had thought the law equally well established that the obligation of a common carrier to serve the public extended to any member thereof properly tendering goods for shipment with the right to ship the same. The statement from the bill for injunction quoted above calls the forwarding agent "a common carrier," as if that were conclusive in freeing the railroad companies from their common law duties in its behalf. Granted the premise, we do not admit the conclusion. This court has held in *Atchison, Topeka & Santa Fe R. R. Co. v. D. & N. O. R. Co.*, 110 U. S. 667, 681, that an intersecting railroad company or in other words a common carrier comes to another railroad "*just as any other customer does and with no more rights,*" and further, in referring to the common law obligation of the latter railroad in such a case (p. 683): "As to the obligation to carry there is no dispute."

To the same effect is the case of *Shelbyville Railroad Co. v. Louisville, Cin. & L. R. R. Co.*, 82 Ky. 541, 545, in which the court said:

"The common law obligations of a railroad company to a connecting line are the same as to reception, transportation and delivery of freight as those existing between the railroad company and any individual shipper."

This statement of the law is approved in *Hedding v. Gallagher*, 72 N. H. 377, 382. The above holdings are in no way adverse to the holding of this court in the "Express Cases" so called, 117 U. S. 1. Those cases merely held that railroad companies were not

"charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried."

The forwarding agents are not contending for the right to be carried by the railroads as express companies are accustomed to be carried, but that goods should be carried for them when tendered by them in the same manner as by other shippers. This right we think cannot be denied.

It necessarily follows that being "shippers" whom the railroad companies are bound to serve, the forwarding agents are "persons" within the meaning of Section 2 of the Interstate Commerce Act.

We have not thought it necessary at this point to discuss in detail the English cases cited under this heading. The law on the points above stated is so well established by cases from our own courts that we have deemed further amplification superfluous. The citations referred to will, however, be found to explicitly and definitely uphold the points taken.

II.

IN CONSTRUING THE SECOND SECTION OF THE ACT TO REGULATE COMMERCE, THE COURTS OF THE UNITED STATES ARE BOUND BY THE CONSTRUCTION BY THE ENGLISH COURTS OF SECTION 90 OF THE ENGLISH CONSOLIDATED RAILWAYS CLAUSES ACT.

(a) Section 2 of the Act to Regulate Commerce is modeled on Section 90 of the English Consolidated Railways Clauses Act.

Interstate Commerce Commission v. B. & O. R. R. Co., 43 Fed. 37, 53, affirmed 145 U. S. 263, 284.

Texas & Pac. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 222.

In the Matter of Party Rate Tickets, 12 I. C. C. Rep. 96.

Buckeye Buggy Co. v. C. C. & St. L. Ry. Co., et al., 9 I. C. C. Rep. 620, 625.

(b) It is a settled rule of construction that when a statute of one state is adopted by another state, and such statute has been construed by the courts of such former state, the construction so put upon such statute is considered by the courts of the adopting state as enacted with it and is received with all the weight of authority.

McDonald v. Hovey, 110 U. S. 619, 628.

Henrietta Mining & M. Co. v. Gardner, 173 U. S. 123, 130.

The principles necessary to the government and regulation of common carriers by rail were threshed out and established in England at a much earlier date than they were in the United States. As a consequence, when Congress took up the matter of regulatory legislation of railroads, it was but natural that it should, for guidance, turn to England where such legislation had been tried. The fundamental principles there evolved through long experimenting with special acts had finally been embodied in general law in the Railways Clauses Consolidation Act of 1845. It was with this legislation before it that Congress entered upon the task of regulation of American railroads. Section 90 of the last mentioned act furnished the model for Section 2 of the Interstate Commerce Act, the principle therein contained being enacted with no substantial change.

See cases cited under II (a), *supra*.

The rule stated in II (b), *supra*, needs no amplification or explanation. It is a rule generally accepted and expressly recognized and adopted by this court. In the case of *Interstate Commerce Commission v. B. & O. R. R. Co.*, *supra*, the court said (43 Fed. 51) :

“It will be seen from an examination of the English railway traffic acts of 1845 and 1854 that Section 90 of the former and Section 2 of the latter were substantially adopted and embodied in Sections 2 and 3 of our Act to Regulate Commerce.”

On page 53 of the same case the court expressly refers to the case of *McDonald v. Hovey*, *supra*, as announcing the rule set forth under II (b), *supra*, and as imposing on the courts of the United States the obligation of following the construction of the English courts in construing Section 2 of the Interstate Commerce Act, using the following language:

“Our Act to Regulate Commerce having adopted substantially Sections 2 and 90 of the English Railway Traffic Acts of 1854 and 1845, the settled construction which the English courts had given to their terms and provisions must be received as incorporated into our statute.”

This holding has never been questioned so far as we have been able to ascertain, but has, on the contrary, been repeatedly affirmed. See cases cited, *supra*.

III.

THE QUESTION WHETHER GOODS ARE OFFERED FOR SHIPMENT "UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS" WITHIN THE MEANING OF SECTION 2 OF THE ACT TO REGULATE COMMERCE, IS ONE OF FACT.

Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U. S. 144, 170.

Cin., N. O. & Tex. Pac. Ry. v. Int. Com. Com., 162 U. S. 184, 194.

Piddington v. Southeastern Ry. Co., 94 Eng. Com. Law Rep. 111.

Crouch v. Great Northern Ry. Co., 11 Exchequer 742, 750.

Baxendale v. Great Western Ry. Co., 16 C. B. (N. S.) 137.

Great Western Ry. Co. v. Sutton, 4 Law Rep. Eng. & Irish Appeals 226.

This proposition seems never to have been seriously controverted. The determination of the nature and quality of the varied circumstances and conditions of carriage must necessarily be a question of fact. Chairman Knapp in his dissenting opinion in the case of *Export Shipping Co. v. Wabash R. R. Co. et al.* (Rec., 24, 48), which was the case at bar before the Commission, admits that the question of dissimilarity of circumstances and conditions is one of fact. The fundamental error committed in this opinion by the chairman lies in his assumption that, in determining this question of fact, it is proper to take into consideration facts and circumstances entirely unconnected with the matter of carriage of the goods and having to do

solely with questions of general policy and expediency.

IV.

THE PHRASE "UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS," AS FOUND IN SECTION 2 OF THE ACT TO REGULATE COMMERCE, HAS REFERENCE SOLELY TO THE MATTER OF THE PHYSICAL CARRIAGE OF THE GOODS.

Parker v. Great Western Ry. Co., 7 M. & G., 253, 291.

Crouch v. Great Northern Ry. Co., 11 Exchequer Rep. 740, 751.

Piddington v. Southeastern Ry. Co., 94 Eng. Com. Law Rep. 111.

Parker v. Great Western Ry. Co., 11 C. B. 545.

Edwards v. The Great Western Ry. Co., 11 C. B. 545.

Edwards v. The Great Western Ry. Co., 11 C. B. 588, 647.

London & N. W. Ry. Co. v. Evershed,^{CR} 3 H. L. & Privy Council Part 2, page 1029.

Great Western Ry. Co. v. Sutton, 4 Law Rep. Eng. & Irish Appeals 226.

Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.,^{CR} 11 H. L. & Privy Council 97, 120.

Bigby & Warrior River Packing Co. v. Mobile & Ohio Ry. Co., 60 Fed. 545.

Wight v. U. S., 167 U. S. 512.

U. S. v. Wells Fargo Express Co., 161 Fed. 606.

I. C. C. v. Ala. Midland Ry. Co., 168 U. S. 144, 166.

Buckeye Buggy Co. v. C. C. C. & St. L. Ry. Co., 9 I. C. C. Rep. 620.

In the Matter of Party Rate Tickets, 12 I. C. C. Rep. 96.

The development in England of the principles of equality in rates between shippers was well outlined by Mr. Justice BLACKBURN in the case of *Great Western Ry. Co. v. Sutton*, 4 Eng. & Irish Appeals 237. He says:

"At first the legislature in each special act inserted such clauses as seemed to the particular committees reasonable in each case. Very soon those came to be usual clauses which the then chairman of committees of the House of Lords used to require to be inserted in all railway bills with more or less modification. They were known by his name as 'Lord Shaftesbury's Clauses.'

"Finally, in 1845, the legislature embodied in a general act (8 & 9 Victoria, c. 20) those clauses which it was thought expedient should generally be inserted in railway Acts."

This act of 1845 is generally known as the Railways Clauses Consolidation Act of 1845. Section 90 of this act is as follows:

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful for the company, subject to the provisions and limitations herein and in the special act contained, from time to time to alter or vary the tolls by the special act authorized to

be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway."

During the last century, and particularly about the middle of the century, a number of cases arose in England involving the construction of Section 90 of the above act, or portions of special acts similar thereto, and raising practically the same questions as raised in the case at bar. As has been seen Section 90 of the English Consolidated Railways Clauses Act was the model for Section 2 of the Interstate Commerce Act, and under the rule set forth in II (b), *supra*, the cases just referred to must be of controlling importance.

The questions at issue in these cases were not in every instance the same, varying with the peculiar facts in each case. The decisions, however, turned principally on the interpretation to be put upon the words "of the same description," and "under the same circumstances," as found in Section 90 of the English act. In construing these words as applied to the varying facts in the above cases, the courts evolved and applied certain uniform principles. Briefly stated, these principles were that the words

"of the same description" referred solely to the description of the goods as affecting the matter of carriage and the words "under the same circumstances" referred solely to circumstances attending the carriage of the goods. The earlier of these cases were brought by certain common carriers known as intercepting carriers, who made it their business to assemble and consolidate into hampers or packed parcels, small packages belonging to divers owners, to consign and ship such packed parcels in their own names, by railroad to themselves or their agents at points of destination; there to receive them from the railroad company for distribution among the various owners. Among the earlier of these cases were the cases of *Parker v. Great Western Ry. Co.*, 7 M. & G. 252, 291; *Parker v. Great Western Ry. Co.*, 11 C. B. 545, and *Edwards v. Great Western Ry. Co.*, 11 C. B. 588, 647. In these cases it was held that the character of a shipper as an intercepting carrier, as described above, did not constitute a dissimilarity sufficient to authorize the railroad company to charge such intercepting carriers a higher rate than was charged the general public. In *Edwards v. Great Western Ry. Co.*, *supra*, at page 647, the court said:

"The question, therefore, is this—is the fact of Parker being a carrier *a different circumstance*, or, are the goods carried under *different circumstances* when they are carried for anybody else? Now, looking at the words of the 50th Section of the 7th & 8th Vict. C. III, I cannot say that they are. *The goods are of the like quality, and they are carried along the same portion of the railway, and by the same power, and at the same time, and subject to the same risks and liabilities.*"

In the cases just cited the main question at issue was whether or not the character of the plaintiffs, as intercepting carriers, constituted a dissimilarity in circumstances and conditions. The question of ownership of the goods, the question of controlling importance in the case at bar, was touched on but slightly. This question was, however, raised and disposed of in other cases.

The case of *Crouch v. Great Western Ry. Co.*, 11 Exchequer Rep. 740, raised squarely the question of ownership. POLLOCK, C. B., at page 750, says:

"The third ground stated in the rule is 'that there is a difference between, and a right to charge differently for, packages containing other packages directed to and intended for different consignees, and packages containing other packages directed to and intended for the same consignee; and that the judge should have so directed the jury.' This admits of the same answer. The learned judge left the question to the jury, and they found, as a matter of fact, that, although there was an apparent difference, yet there was no real difference, so as to warrant a different charge. The fourth ground mentioned in the rule is 'that the verdict of the jury in finding that the defendants were not entitled to make such extra charge, and also that there was no such difference between the two classes of parcels, is against evidence.' I am of opinion that it is not. In no single instance has it occurred that there have been two actions against a carrier in respect of an enclosed parcel because the enclosures belonged to two different persons. Then, how can it be said that there is a greater risk or a greater liability? We must look at matters of this sort practically, and not draw nice distinctions, when there are facts which lead to a correct conclusion."

In the case of *Piddington v. Southeastern Ry. Co.*, 94 Eng. Com. Law. 111, the question of ownership of the goods was raised and decided in accord with the foregoing cases, though the principal question at issue was whether the packing of parcels, namely, the consolidation of several small packages into one large parcel, constituted such a dissimilarity as to warrant a higher charge on such consolidated parcel than was charged for the same weight, quality and quantity of goods when enclosed in a single parcel. The court held that the question of dissimilarity was properly left to the jury, and that a verdict of no dissimilarity was supported by the evidence. WILLES, J., at page 118, says:

"I must confess that it was some time before I could understand that such a question as this could be seriously argued; my impression was that it had been clearly settled by decided cases. The question is whether the company can lawfully charge for parcels which are packed or tied together, double the sum which they would charge for the same parcels if carried separate. If the company are bound to make a reasonable charge, or to charge equally and at the same rate to all persons in respect of goods of a like description, they cannot so charge. The first point put by Mr. Cowling in his argument in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, and commented on by the court, was, whether, where the goods belonged to different persons, the carrier might not fairly make an additional charge for the increased risk, inasmuch as he might in case of loss or damage be subjected to several actions. Although that is a very ingenious argument, I must confess I never could properly appreciate it. It assumes that the defendants will violate their duty as carriers. On the other hand, sup-

pose several actions were brought, the defendants would recover their costs, which, generally speaking, are to be assumed to be a complete compensation. Here, the jury found that there was not any increased risk. But, independently of that finding, I must own that I should have thought that the company's risk could not be at all increased by the circumstance of several parcels being put into one package. It may be inconvenient that the company should be subjected to several actions in respect of the loss of one single package. The observations of Lord Wensleydale upon that subject in the case of *Pickford v. The Grand Junction Railway Company*, 10 M. & W. 399, 423, are deserving of attention, as, indeed, was every word that fell from that very learned judge. But it seems to me to be unnecessary to consider that here. I think the jury were quite justified in concluding that the alleged increase of risk from the carriage of packed parcels was altogether illusory."

The case of *Crouch v. Great Western Ry. Co., supra*, also holds that the mere combination of small packages into one large parcel does not constitute a dissimilarity sufficient to justify a higher charge.

The case of *Great Western Railway Company v. Sutton*, 4 Law Rep. Eng. & Irish Appeals 226, was the last word of the English Courts on the questions involved in these so-called "Packed Parcel Cases." This case was an action brought by one Sutton against the defendant railway company for over-charges. Sutton was engaged in the business of an intercepting carrier as that business has been above described. Defendant had, under the statute, a certain "packed parcel" rate. Sutton complained that the defendant railway company charged him this

full packed parcel rate, while it charged certain wholesale concerns, shipping the same kinds of parcels, a much lower rate. The question of ownership of the goods does not seem to have been argued, the defendant relying chiefly on the fact of the plaintiff being an intercepting carrier, as justifying the higher rate. The House of Lords, however, made an exhaustive review of the cases preceding this case and in their opinion discussed all phases of the question. *The proposition is reiterated again and again that the dissimilarity in description of the goods, and in circumstances of the carriage must be a dissimilarity affecting the matter of the physical transportation of the goods, varying the risk, liability, burden or expense to the carrier of that transportation.*

The opinions of the various justices are so illuminating and discuss the questions involved so thoroughly that we may be pardoned for quoting from them extensively.

Mr. Justice BLACKBURN, at page 239, says:

"It would be the very essence of the case to prove that the goods were 'of the like description and carried under the like circumstances,' but *I think that this applies to the description of the goods and the circumstances of the carriage and not to the trade of the consignor or consignee.* The consignor in the present case was what has been called an 'intercepting carrier,' competing with the defendants in one of the most lucrative branches of their traffic. They would have an intelligible motive for wishing to eolog his trade, and I do not see that there would be anything immoral or improper in their doing so by any legal means. But I think that the preamble to the 90th Section of

the Railways Clauses Consolidation Act, 1845, shews that the Legislature thought it inexpedient that railway companies should use their powers for such a purpose, and that the intention in passing the equality proviso was to prevent their treating such a person worse than others."

Mr. Justice WILLES, at page 247, says:

"The question what is the meaning of the equality clause when it speaks of things of 'like description' conveyed under 'the like circumstances' ought, I think, to be answered by saying that *things are of a 'like description' when, although their composition and structure are not 'identical,' which would be expressed by 'the same description,' not 'like description,' they are similar in those qualities which affect the risk and expense of carriage, and that they are conveyed under like circumstances where the route, risk and expense are, in the opinion of a jury, the same, otherwise not.*'"

Lord CHELMSFORD, at page 260, says:

"I have felt greater difficulty in ascertaining the meaning of the words 'under the same' or 'under like circumstances.' *I do not see, however, how they can relate to anything else than the conveyance of the goods.* To say that because the plaintiff is (what has been called) an intercepting carrier, and the other persons using the railway are wholesale dealers, therefore the goods are not conveyed along the railway under the like circumstances, is an application of the words which I am unable to comprehend."

(*Italics are ours.*)

The holdings in the foregoing cases were based on the fundamental proposition that the words "of the same description" and "under the same cir-

cumstances," as used in the act, had reference solely to the matter of carriage of the goods. In these cases, which were the outgrowth of the struggle between the intercepting carriers and the railways, the principal issues clustered around the character of the intercepting carriers and their methods of handling goods. Numerous cases have however, arisen both in England and the United States involving a construction of Section 90 of the Consolidated Railways Clauses Act and Section 2 of the Interstate Commerce Act, respectively, as applied to other situations in which various facts and circumstances other than those in the above cases have been argued as constituting a dissimilarity.

In deciding these cases the courts have uniformly taken as their guiding rule of construction the rule as stated above, namely, that the phrase "under the same circumstances" in Section 90 of the English Act and the phrase "under substantially similar circumstances and conditions" in the American Act have reference solely to the matter of carriage of the goods.

In the case of *London & N. W. Ry Co. v. Ever-shed*,³ House of Lords and Privy Council, Part 2, page 1,029, the facts were briefly as follows:

Railroad M. had direct connection by siding with certain brewers in the town of B. The saving in cartage and economy of carriage was returned to these brewers in the form of a rebate. The N. W. R. R. having no siding connections with these brewers, but wishing to get their business, allowed them the same rebate as was allowed them by Railroad

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M. It was held that such a rebate was an unlawful discrimination as to persons paying the regular published tariff, and that competitive reasons such as existed in this case could not be considered in applying Section 90 of the Consolidated Railways Clauses Act. Mr. Justice BLACKBURN says, on page 1,038:

“What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.”

In the case of *Denaby Main Colliery Co. v. Manchester, Sheffield and Lincolnshire Co.*,¹¹ House of Lords & Privy Council, page 97, the facts were in part as follows: The railroad company, in order to encourage and build up the coal trade to certain ports, made a rebate on coal carried over its line to a certain town for trans-shipment to these ports. It was held that such rebate was unlawful. Lord BLACKBURN said, on page 120:

“I think that it is finally settled by *Great Western Ry. Co. v. Sutton*, and Evershed’s case, that if passing over the same portion of the railway (a fact which was not disputed in either of these cases) the obligation to charge in respect of goods of the same description equally is imposed if they are under the same circumstances, and that the circumstances are those relating to the carriage of the goods, not the person of the sender. That the fact that persons who are charged less are, as in Evershed’s case, so situated that they can go by another route, and probably will do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an un-

equal charge. Neither is it a difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade."

The case of *Wight v. United States*, 167 U. S. 512, was a case identical in its facts with the case of *London & N. W. Ry. Co. v. Evershed, supra*. In construing Section 2 of the Act to Regulate Commerce as applied to these facts, this court came to the same conclusion as did the House of Lords in the last mentioned case, namely, that the phrase "under substantially similar circumstances and conditions" referred to the matter of carriage and did not include competition.

In the case of *U. S. v. Wells-Fargo Express Co.*, 161 Fed. 606 (a very late case), the facts were that certain express companies were making it a practice to issue franks for the use of their mutual employes in the transportation of any goods that such employes might wish transported. The court held that such a practice was unlawful because in contravention of Section 2 of the Interstate Commerce Act, saying, on p. 610:

"The government insists that the 'like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions' of Section 2 'relates to the carriage of the goods and not to the person of the sender or consignee,'" citing *Great Western R. R. Co. v. Sutton*, L. R. 4, H. L. 226, and *Denaby Main Colliers Co. v. Manchester Ry. Co.*, 11 App. Cas. 97. Continuing, the court said: "Therefore, it seems clear that the court should, on the facts of the case, consider the language above quoted from Section 2 as referring to the carriage of the

goods and not as applying to the person or capacity of the sender or receiver."

It is worthy of note that the language just quoted defining the meaning of said Section 2 fell from the lips of the same judge who handed down the decision in the case of *Lundquist v. the Grand Trunk Western Railway Co. et al.*, 121 Fed. 915, much relied on by counsel for appellees. It raises a grave doubt whether or not, if the Lundquist case were now before the court, the same decision would be reached.

The case of *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 166, in defining Section 4 of the Interstate Commerce Act and indicating the matter that may be taken into consideration under it, clearly defines the meaning and scope of Section 2. The case of *Wight v. U. S., supra*, is expressly affirmed, the court saying:

"As we have shown in the recent case of *Wight v. United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers shipping over the same line the same distance under the same circumstances of carriage are compelled to pay different prices therefor; and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes."

The decision of the Interstate Commerce Commission in the case of *Buckeye Buggy Co. v. C. C. C. & St. L. Ry. Co.* 9 I. C. C. Rep. 620, is based squarely on the proposition that no dissimilarity

of circumstances and conditions of carriage was shown by the evidence in the case.

The English cases above referred to are cited with the statement (p. 625) that the Supreme Court of the United States has in the case of *Wight v. U. S., supra*, followed them at least to the extent of holding that the words "circumstances and conditions" in the second section of the Interstate Commerce Act refer to the matter of carriage and not to competition. The question at issue in the case at bar is expressly left undecided.

In the opinion of the Interstate Commerce Commission, In the Matter of Party Rate Tickets, 12 I. C. C. Rep. 96, it was held that party rate tickets cannot lawfully be limited to particular classes of persons, but must be open to the general public. The Commission was of the opinion that the real question at issue was whether or not the phrase "under substantially similar circumstances and conditions" as used in Section 2 of the Interstate Commerce Act referred exclusively to the carriage of the property or the persons or include "the commercial and competitive conditions which indirectly attach to the transportation."

The cases of *Wight v. U. S.* and *I. C. C. v. Ala. Midland Ry. Co., supra*, were cited in support of the conclusions reached, the commission using the following language on page 100:

"Here, then, we have two cases decided at substantially the same time—one necessarily holding that the words 'circumstances and conditions' in the second section refer only to the carriage itself; the other holding that those words in the fourth section may be extended

beyond the carriage, but expressly reaffirming the doctrine of the Wight case, that they must, in the second section, be confined to the transportation alone, and cannot be made to include competitive and other considerations. So far as we can ascertain, this position of the Supreme Court has never been in any degree departed from it." * * *

And on page 104:

"We are unable to see how the carriage of ten persons belonging to an amusement company as a party differs from the carriage of ten other persons as a party in the same train, at the same time and between the same points; and we are therefore of the opinion that the party rate ticket must be open to the general public."

We believe that the Interstate Commerce Commission has rightly interpreted the holdings of this court and that those holdings settle the questions involved as fully and conclusively as they have been settled in England.

V.

SECTION 2 OF THE ACT TO REGULATE COMMERCE PRESCRIBES A RIGID RULE OF ACTION. IF THE CIRCUMSTANCES AND CONDITIONS ATTENDING THE CARRIAGE OF GOODS ARE SUBSTANTIALLY SIMILAR THE CHARGE MUST BE THE SAME.

London & N. W. Ry. Co. v. Evershed,^{L.R.} 3
House of Lords & Privy Council, part 2,
page 1,029.

*Denaby Main Colliery Co. v. Manchester,
Sheffield & Lincolnshire Ry.* C.^{L.R.} 11
House of Lords & Privy Council, p. 97.

U. S. v. Del. L. & W. R. R. Co., 40 Fed. 101,
103.

In the Matter of Party Rate Tickets, 12 I.
C. C. Rep. 96.

No clear and definite idea of the scope and meaning of Section 2 of the Interstate Commerce Act can be obtained unless it be read in connection with the other sections of the act of which it is a part, and particularly in connection with Section 3 of the act. When so read it appears that in Section 2 of the act Congress has described and detailed one particular situation which might well be included under Section 3 of the act, but which is by said Section 2 expressly made unlawful. Said Section 3 provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal

facilities to another carrier engaged in like business."

Section 3 is broad enough in its terms to cover every conceivable form of unlawful discrimination. Under Section 3 it is always a question when a discrimination has been shown whether or not such discrimination is "undue," and hence unlawful within the meaning of the act. Under Section 2 of the act, as we conceive it, no such discretion is vested in the courts. The courts are limited in their investigation as to whether or not the circumstances and conditions of the carriage itself are substantially similar. If they so find, then the act applies and any discrimination in rates is *ipso facto* unlawful.

We are not without authority for this construction of said Section 2.

In the case of *London & N. W. Ry. Co. v. Ever-shed*, *supra*, Lord BLACKBURN said, at p. 1,038, in suggesting that Parliament might have made an exception to Section 90 of the Consolidated Railways Clauses Act, allowing the consideration by the courts of other circumstances than the carriage of the goods:

"However, whether that would have been a prudent and proper thing for the Legislature to say or not, it is not what the Legislature has said, and it is very likely that it was the intention of the Legislature not to say it because it was thought that if equality of charge is to be disregarded under any circumstances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the Legislature

has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all."

To the same effect is the case of *Denaby Main Colliery Company v. Manchester, Sheffield and Lincolnshire Ry. Co., supra.*

The case of *U. S. v. Del. L. & W. R. R. Co.*, 40 Fed. 101, 103, discusses the meaning and purview of Sections 2 and 3 of the Interstate Commerce Act. The court says:

"Unjust discrimination is prohibited by Sections 2 and 3 of the Interstate Commerce Act. What constitutes unjust discrimination may be ascertained from the language of these sections. * * * By Section 2 it consists in charging one person a different compensation than is charged another for doing 'the like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.' By Section 3 it consists in giving 'any undue or unreasonable preference or advantage' to any particular shipper, or subjecting him to any undue or unreasonable prejudice or disadvantage in any respect whatever. The former relates to unjust discrimination in rates; the latter is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the convenience and facilities supplied to shippers in any of the details of the carrying service."

(Italics are ours.)

The Interstate Commerce Commission, in the matter of party rate tickets, 12 I. C. C. Rep. 96, ex-

pressly recognizes the construction of Section 2 contended for. The commission says, at page 104:

"It will be seen that under the holding of both our own and the English courts, Section 2 prescribes a rigid rule of action. If the circumstances and conditions of the carriage itself are the same, the charge must be the same. * * * We have not deemed it necessary to discuss the question of policy involved, since in our opinion the decisions of the Supreme Court preclude such discussion."

VI.

THE EVIDENCE IN THIS CASE SHOWS CONCLUSIVELY THAT THE CIRCUMSTANCES AND CONDITIONS OF CARRIAGE OF GOODS, WHEN SHIPPED BY A FORWARDING AGENT IN THE MANNER SHOWN BY THE RECORD IN THIS CASE, ARE NOT SUBSTANTIALLY DISSIMILAR FROM THE CIRCUMSTANCES AND CONDITIONS OF CARRIAGE OF THE SAME GOODS WHEN THE TITLE THERETO IS VESTED IN THE CONSIGNOR OR CONSIGNEE.

In the English cases cited under IV of this brief in which the question, as to whether or not a diversity of ownership of goods offered for shipment constituted a dissimilarity of circumstances, was submitted to the jury, the verdict returned without exception was that it did not.

In the case at bar the questions of fact are to be determined by the court from a consideration mainly of the evidence taken before the Interstate Commerce Commission in the proceedings in this case before that body. We do not consider the affidavits of Mr. Jenney*(Rec., 118) and Mr. Caldwell (Rec.,

* "Rec." in this brief refers to printed transcript.

124), filed with the bill for injunction in the United States District Court for the Southern District of New York, as entitled to serious consideration. They are replete with argument unsupported by facts and singularly at variance with the evidence which the gentlemen making them were able to adduce before the Commission in the presence of opposing counsel. If the assumptions taken as working premises for the elaborate arguments in these affidavits are facts, it seems strange that so little evidence of such facts appear in the record of the proceedings before the Commission, in which witnesses were sworn and testified on both sides and free opportunity for cross-examination was had.

Turning to the evidence proper, we submit that the record amply sustains the following propositions:

1. That the liability, burden and expense incurred by a railroad company in handling and transporting from point of origin to point of destination a "consolidated car," so called, made up of less than carload lots of goods belonging to divers owners, but shipped by one consignor to one consignee under one bill of lading, are no more or greater than the liability, burden and expense in the handling and transporting a like car of goods where the ownership of such goods is vested in either the consignor or consignee (Rec., 240, 266, 267); that "consolidated cars," so called, are carried from point of origin to point of destination by the railroad company "under substantially similar circumstances and conditions" as "straight cars," so called, where the ownership of the goods in transit

is vested in either the consignor or consignee. (Rec., 266, 267.)

2. That the equipment and rolling stock of the railroad company are in service a much shorter time in the transportation of consolidated cars than in the transportation of cars of L. C. L. shipments. (Rec., 197, 240.)

3. That the equipment and rolling stock of the railroad company are in service substantially the same time in the transportation of a consolidated car as in the transportation of a straight car, so called. (Rec., 187, 266, 267.)

4. That the equipment and rolling stock of the railroad company are in service substantially the same time in transporting a car assembled by the railroad and shipped on a through schedule as in transporting a straight car, so called. (Rec., 291, 292.)

5. That the number of cases of stoppage of goods *in transitu*, whether in case of shipment by forwarding agents or otherwise, are so few as to render the possible exercise of such right immaterial in the practical matter of rate making; that such possibility casts no appreciably greater burden on the railroads in the one case than in the other (Rec., 267); and that counsel for the railroads in this proceeding before the Commission admitted that the right of stoppage *in transitu* was in any case so seldom exercised in their experience as to be practically unknown. (Rec., 267.)

6. That claims for loss and damages to goods *in transitu* are very much fewer in case of trans-

portation of consolidated cars than in transportation of cars of L. C. L. shipments (Rec., 184, 188, 189, 200, 201, 213, 225); that the forwarding companies employ expert car loaders who consolidate goods assembled at point of shipment into carload lots, and that when such carload lots are so made up, the goods go through from point of origin to point of destination substantially without injury or damage (Rec.²³⁶, 184, 188, 189, 200, 201, 281, 270, 225, 245, 246, 256, 265, 283), and that such claims for damages as do arise are brought in the names of the forwarders of the goods rather than in the names of the various owners, thus freeing the railroad companies from any added burden which might be imposed upon them by reason of a multiplicity of suits by the various owners. (Rec., 259, 260.)

Section 11 of the bill for injunction in this case alleges, however (Rec., 14) :

"That the circumstances and conditions under which carload shipments of forwarding agents, made up of the several less than carload shipments of various owners, are transported by your orators, are substantially dissimilar from the circumstances and conditions under which carload shipments of a single ownership are transported by your orators. The dissimilar circumstances and conditions appear from the facts hereinbefore set forth, and may be summarized as follows:

"(A) The forwarding agent is not a 'person' within the definition of said Section 2. On the contrary, it is an independent shipping agency or common carrier, and as such seeks to use the facilities and equipment of your orators.

"(B) The forwarding agent is a competitor of your orators. By the methods of a freight scalper it seeks to perform services and to divert from your orators' business which your orators are equipped for and desire to handle, and would in the absence of the forwarding agent receive. For such purposes it seeks to use the facilities and equipment of your orators.

"(C) The operation of forwarding agents would materially injure the business of your orators by reducing their net revenue and impairing the value of their less than carload equipment.

"(D) The operation of forwarding agents would result in widespread discrimination among less than carload shippers throughout the country, thereby injuring the business interests of a large number of your orators' less than carload shippers and patrons, which injuries must ultimately have a detrimental effect upon the business of your orators.

"(E) The extensive operation of forwarding agents, by reducing your orators' revenues would compel them to raise their freight rates or diminish their service, necessitating a readjustment of long established relations between the carriers and shippers and among shippers themselves, to the injury of your orators' less than carload shippers and patrons and your orators' business.

"(F) The extensive operation of forwarding agents would result in economic changes, such as the elimination of small jobbers, that will injure the business interests of many of your orators' less than carload shippers and patrons, and thereby your orators' business.

"(G) False billing and false classification are more prevalent in carload shipments by forwarding agents than in carload shipments of a single ownership, and your orators would be subjected to greater expense and vigilance in detecting and preventing such practices.

"(H) The carload shipments of forwarding agents would subject your orators to increased claims for damages and to a multiplicity of suits by the several owners of the goods contained in said shipments.

"(I) The carload shipments of forwarding agents would result in greater delay to cars at point of loading than carload shipments of a single ownership.

"(J) The carload shipments of forwarding agents would subject your orators to greater liability than carload shipments of a single ownership, by reason of the operation of several rules of law, namely, seizure of goods by legal process, reclamation of goods by their real owner, and stoppage in transit."

We submit that paragraphs H, I and J in the above summary alone contain matters having to do with the carriage of the goods, which is the only question proper to consider in determining whether or not the goods are carried under substantially similar circumstances and conditions.

With regard to paragraph H above quoted, we desire to say that the record referred to above shows that the forwarding agents employ expert car loaders, and that cars loaded by them go through substantially without damage and in the same manner as other carload shipments of freight. As to a multiplicity of suits, the evidence is to the contrary. From a standpoint of practical expediency it is to the advantage of every one concerned that the forwarding agent itself handle claims arising out of injury to goods shipped by it. It has the equipment and experience to expeditiously and economically adjust such claims, and experience has shown that business practice in this regard, as in most others, follows practical common sense lines.

As was well said by Chief Baron Pollock in *Crouch v. Great Northern Railway Company*, 11 Exchequer Rep. 740 at p. 751, after stating that the evidence failed to show a multiplicity of actions due to diversity of ownership of goods shipped in "packed parcels":

"Then how can it be said that there is a greater risk or a greater liability? We must look at matters of this sort practically, and not draw nice distinctions when there are facts which lead to a correct conclusion."

In the case of *Buckeye Buggy Co. v. C. C. C. & St. L. Ry. Co.*, 9 I. C. C. Rep. 620, in speaking of the fact of diversity of ownership as constituting a dissimilarity, the commission, speaking by Commissioner PROUTY says at p. 626:

"To a lawyer this legal proposition may well seem to create a material difference in conditions; as applied to the actual transaction that difference is hardly substantial. Claims for loss or damage to property in transit make up a very small part of the operating expenses of a railway. It has been frequently said in testimony before us, that risk of this kind is so small that it is not taken into account in fixing rates and the relation of rates upon most commodities. If the liability itself is not considered, still less important is it who may bring suit for the damage. There may be weighty reasons why rules against forwarding agents can be and should be adopted, but this is hardly one of them. No traffic manager ever promulgated notes 2 and 3 on this account."

As to the abstract legal right of the beneficial owner of goods to bring an action in tort for their loss or damage there probable cannot be much dispute. As to the exercise of such a right, as we have

shown above, such a proceeding is practically unknown. The customary form of suit in such a case is undoubtedly in contract and on the special contract of carriage. In this form of action we submit that the forwarding agent, or, in other words, the party making the contract of carriage, would be the only proper party plaintiff.

Authority is ample to the effect that the forwarding agent as bailee of the goods having a special property therein may itself bring an action in tort for loss or damage.

Great Western Ry. Co. v. McComas, 33 Ill. 186.

Edgerton v. C., R. I. & P. Ry. Co., 240 Ill. 311.

Spence v. Norfolk R. R. Co., 92 Va. 102.

Hooper v. C. & N. W. Ry. Co., 27 Wis. 81.

Finn v. Western R. R. Corp., 112 Mass. 524.

National Surety Co. v. U. S., 129 Fed. Rep. 70.

The Beaconsfield, 158 U. S. 303.

The proposition that the forwarding agent as consignor and maker of the contract of carriage may maintain an action in contract hardly needs citation of authority for its support. The following cases sustain the proposition:

Ohio & M. R. Co. v. Emrich, 24 Ill. App. 245.

Northern Line Packet Co. v. Shearer, 61 Ill. 263.

Ill. Central Railroad Co. v. Schwartz, 11 Ill. App. 482.

Buckeye Buggy Co. v. C., C., C. & St. L. Ry. Co., *supra*.

Invested as the forwarding agent is with these ample rights for the protection of the beneficial owners of goods by suit either in tort or contract as set forth above, and especially equipped and experienced in such matters, it is not surprising that experience shows a uniform handling of claims for loss or damage by the forwarding agent rather than by the beneficial owner.

As to paragraph I, quoted above, it is perhaps sufficient to say that unless the goods are tendered by the forwarding agent for shipment within the limits of one working day as prescribed by rule they are not entitled to the carload rating. With this rule we have no quarrel. As a matter of fact, the evidence shows a more expeditious and speedy loading of cars by the trained employes of the forwarding companies than by the average beneficial owner of goods for carload shipment. (Rec., 187, 266, 267.)

In reply to said paragraph J, we call attention to the fact that the evidence shows that the burden and liability incurred by the railroads by reason of the matters included under this heading is so small as to be disregarded as a matter of practical rate making. The remark of the Interstate Commerce Commission in the Buckeye Buggy Co. case quoted from *supra* as to the liability of the railway companies to suit by the various owners of a consolidated car of goods, it seems to us applies with even more force to the point now under discussion.

The whole question of similarity or dissimilarity of "circumstances and conditions" must be determined as a matter of practical experience and ac-

ual fact, not as a matter of abstract and academic possibility. We believe the evidence before this Honorable Court shows that the alleged dissimilarity in circumstances and conditions of shipment between a consolidated carload of goods and a like carload of goods the title to which is vested in either the consignor or consignee, sought to be established by counsel for the appellees, is actually non-existent and is, in the language of Justice VILLES in the case of *Piddington v. Southeastern Ry.*, 94 Eng. Com. Law Rep. 111, 118, "altogether illusory."

VII.

DISCUSSION OF QUESTIONS OF POLICY RAISED BY COUNSEL FOR APPELLEES.

Counsel for appellees raise many points in their bill for injunction which we believe are not properly open for consideration under the true construction of Section 2 of the Interstate Commerce Act and the construction adopted and applied by this Honorable Court. We believe that the sole question before this court for determination is whether or not the circumstances and conditions of the carriage of the goods are dissimilar. We believe that all other matters and questions of commercial or competitive expediency are by the terms of the act expressly excluded from judicial consideration. It is, however, with no wish to evade the issues tendered by counsel for appellees on such other matters extrinsic to the question of carriage that we take this position. It is our idea, as has

already been set forth in V *supra*, that the principle embodied in Section 2 of the Interstate Commerce Act is so universal in its application and so infallible in its operation as to properly override all other considerations of policy. And such we submit was the idea of Congress in embodying this section in the Act to Regulate Commerce. Lest it appear, however, that we have left unanswered any, even plausible argument, advanced by counsel for appellees, we may be pardoned for taking up and briefly discussing some of these contentions. Paragraphs A to G inclusive in Section 11 of the bill for injunction in this case quoted *supra*, perhaps fairly set forth the arguments of counsel for appellees in this regard. For convenience, we will again quote separately said paragraphs as we discuss them in order.

Said paragraph A is as follows:

"The forwarding agent is not a 'person' within the definition of said Section 2. On the contrary, it is an independent shipping agency or common carrier, and as such seeks to use the facilities and equipment of your orators."

In so far as this language is directed to the character of the forwarding agents as such and as not entitled to invoke the protection of the Act to Regulate Commerce, because not "persons" within the meaning of the act, we believe that a complete answer to it will be found under Section 1 of this brief. We do not think that counsel can be seriously committed to the advocacy of this proposition.

In so far as the above language can be made to apply to the character of the forwarding agents as

a dissimilarity in circumstances and conditions, we submit that the authorities cited and quoted from in this brief establish the law in both England and the United States that the character of the consignor or consignee is immaterial except as such character casts upon the railroads added burden, expense or liability, or, in other words, creates a dissimilarity in the circumstances and conditions of the carriage itself. We believe that it has been shown by this record that the character of the forwarding agent does not constitute any dissimilarity.

Said paragraph B is as follows:

"The forwarding agent is a competitor of your orators. By the methods of a freight scalper it seeks to perform services and to divert from your orators business which your orators are equipped for and desire to handle, and would in the absence of the forwarding agent receive. For such purposes it seeks to use the facilities and equipment of your orators."

The forwarding agent is called a competitor of the railroad company. In what way is it a competitor? What is the subject matter of the competition alleged to exist by counsel for appellees? Not the service rendered in transporting the goods from point of origin to point of destination, surely, for the forwarding agent relinquishes all control of the goods on their delivery to the railroad for shipment and does not reassume control until delivery at the point of destination. It attempts to perform no part of the act of carriage by rail and receives no compensation therefor, paying the full published rate to the railroad company.

The only alternative remaining, if counsel's contention as to the existence of competition is to be maintained, must be that there is competition in what is generally known as the accessorial service in preparing and tendering the goods for shipment.

If it be admitted that the genius of American institutions entitles a railroad company to enjoy a monopoly in the transportation of merchandise on its own line of railroad and that competition in the sense of competition by some other carrier attempting to infringe on this monopoly is unlawful, the admission serves no further purpose than to render untenable the contention of counsel for appellees. It furnishes us light as to the true and restricted meaning of the term when used in this connection. To wrest the statement, that such competition is unlawful, from its setting, strip it of all of its qualifications and restrictions and apply it to a wholly different situation is calculated to produce nothing but obscurity and error. The statement in question has no application to competition between the railroad company and any other person or agency whatever for the opportunity to perform accessorial services on the goods to be tendered for shipment. Such services are entirely disconnected with the act of carriage of the goods by railroad. They constitute a *separate and distinct transaction*.

I. C. C. v. Detroit, etc., Ry., 167 U. S. 633, 643, affirming 74 Fed. 803, 813.

Also *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21, 28.

If the railroad company itself undertakes these accessoriel services, which, according to the statement in *I. C. C. v. Detroit, etc., Ry.*, 74 Fed. 813, is rarely done, we submit that it does so just as any other person or agency wishing to undertake the same service with no more privileges and no more rights. So that when the above statement has been stripped of its meaningless generalities and we get instead definite facts and a definite situation, we find that the only competition that can exist is one entirely proper and lawful and one which, for the best interests of the public at large, should continue.

As a matter of fact what the railroad companies in this proceeding really desire is not that they may themselves perform the accessoriel services necessary in the transportation of goods, but that each individual owner of goods shall be compelled to perform them for himself. They wish to deprive the shipper of the benefit of the shipping agent so that he may be compelled to classify under the most expensive classification of freight rates.

We deny the right of the railroad companies to impose on the shipper any such obligation. We assert the right of the shipper to classify and ship under any classification within whose terms as to circumstances and conditions of carriage he is able to bring himself. To this end we claim for the shipper the right to make use of all legitimate means, such as the employment of the forwarding agent or combination with other shippers, for the shipment of his goods.

Said paragraph C is as follows:

"The operation of forwarding agents would materially injure the business of your orators, by reducing their net revenue and impairing the value of their less than carload equipment."

Summed up in a single sentence the contention here is, that, having provided equipment to handle a great volume of L. C. L. business, the railroads have the inherent right to require shippers to use the expensive equipment provided, and pay the high L. C. L. rate therefor, even though other and cheaper modes of shipment might be open to such shippers. The argument advanced by counsel is founded in error. It is founded upon the proposition that the railroad companies are in any event entitled to make a return on their capital invested. The position is untenable on the face of it. The special rights, privileges and franchises granted by the state to common carriers are a trust for the benefit of the public, to be administered for the benefit of the public, not a guarantee of sure returns on capital invested.

In the case of *M. K. & T. R. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645, 648, the court said:

"To be just and reasonable within the meaning of the constitutional guaranty, the rates must be prescribed with reasonable regard for the cost to the carrier of the service rendered and for the value of the property employed therein; but this does not mean that regard is to be had only for the interests of the carrier, or that the rates must necessarily be such as to render its business profitable, for reasonable regard must also be had for the value of the service to the public and where the cost to the carrier is not kept within reasonable limits or

where for any reason its business cannot reasonably be so conducted as to render it profitable, the misfortune must fall upon the carrier, as would be the case if it were engaged in any other line of business."

The same rule is laid down in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 412.

We have already in our discussion of the preceding point expressed our belief that in the discharge of their duties to the public, it is incumbent on the railroad companies to allow all members of the public to ship goods in the most economical manner possible consistent with the expense involved in the carriage. A shipper either can or cannot qualify under a given classification. If he can qualify he is entitled to ship at the rate applicable to his classification. Loss to the carrier may be a ground for revising rates if they are so low as to amount to taking property without due process of law; it can never be an argument in favor of refusing to allow any shipper to classify to his best advantage so as to take advantage of existing rates. And so in the case of *Buckeye Buggy Co. v. C. C. C. & St. L. Ry. Co.*, 9 I. C. C. Rep. 620, the Commission, in speaking of loss of revenue to the railroads under circumstances similar to those in the case at bar, says, at page 628:

"However, there is no occasion to consider this aspect of the matter. The question before us is not whether carriers shall grant the carload rating at all, but whether, having allowed it to the consignor, they can refuse it to the consignee. It might increase the revenues of these defendants if they were to give a carload rate to a single individual in each locality and

deny it to all others, but this would be no ground for such discrimination."

Said paragraph D is as follows:

"The operation of forwarding agents would result in widespread discrimination among less than carload shippers throughout the country, thereby injuring the business interests of a large number of your orators' less than carload shippers and patrons, which injuries must ultimately have a detrimental effect upon the business of your orators."

Two classes of discrimination are obviously intended to be included under this heading.

1. Discrimination in charges and facilities by the forwarding companies themselves between various L. C. L. shippers employing them.
2. Discrimination against shippers who, because of their geographical situation or for any other reason, are unable to combine their shipments into carload lots so as to obtain the carload rate.

The argument of counsel throughout this case has been that the forwarding agent is in a position to and does make different charges to various of its patrons for the same service depending on the exigencies of the particular case. It is with this thought in mind, we presume, that counsel apply to the forwarding agents the rather hard sounding name "freight scalper."

Counsel in their argument before the Interstate Commerce Commission relied much in this connection on the case of *Bitterman v. Louisville & N. R. R. Co.*, 207 U. S. 205, the so-called "Ticket Scalpers' Case." The holding of that case was in brief that the business of ticket brokers or scalpers engaged

in the buying and selling the unused return portions of non-transferable railroad passenger tickets was unlawful. The decision of the court was based on the proposition that the provisions incorporated in the contract of carriage on a return trip ticket, making the return portion of the ticket non-transferable, and forfeiting it if transferred to another person, was legal and binding. With this proposition established, it necessarily followed that the business of any person, seeking by deception and fraudulent substitution of names on the ticket, to procure the violation of this valid and binding contract, must be unlawful. How this holding can be applied to the case at bar we are unable to comprehend. In what way does the business of the forwarding agents partake of the nature of the business of scalpers as defined in the above case? They neither buy nor sell railroad transportation. Their business consists in receiving goods into their possession acquiring a special property therein for purposes of shipment and then offering such goods for shipment under an established rate. The forwarding agent presents itself as any other shipper seeking to make a contract of carriage with the railroad company.

It asks transportation for certain goods in its possession, offering to pay the full published rate applicable to goods of that kind, nature and condition. The sole transaction is between the forwarder and the railroad. No deception is practiced and no contractual right is violated.

In the ticket scalpers' case four parties are involved and three transactions. The parties are the

railroad, the original purchaser of the ticket, the broker and the purchaser of the return portion of the ticket. The transactions are the sale of the original ticket at published rates, the sale of the unused portion of the ticket by the original purchaser to the ticket broker and by him again to the ultimate user at some rate less than the published rate. The ticket broker's activities begin only after the establishment of contractual relations between the original purchaser of the ticket and the railroad company, and the use of the ticket one way by such purchaser. If the broker rendered some service to the original prospective purchaser of a return trip ticket enabling him to qualify as entitled to ride on such ticket, the situation might be parallel to the case at bar. Such a service has been declared lawful by the Interstate Commerce Commission, In the Matter of Party Rate Tickets, *supra*, which holds that party rates must be open to the general public. This decision necessarily renders lawful the making up of a special party of single passengers for the express purpose of taking advantage of the rate.

We submit that the question at issue in the case at bar is whether or not the fact of ownership of the goods by some party other than the consignor or consignee constitutes a dissimilarity of circumstances and conditions of carriage of the goods. If it does not, as we believe has been shown beyond all question, there surely can be nothing unlawful in the business of an agency which enables the shipper to take advantage of a rate to which he is entitled by the express terms of the Interstate Commerce Act.

But counsel insist the forwarding agent is under no obligation to publish its rates, and as a matter of fact has a sliding scale of charges for the same service depending on the circumstances of the particular case, and in this way all of the evils of discrimination between various shippers are precipitated. If all of these things were true, which they are not, they would furnish no argument against allowing the forwarding agents to continue to do business. If the possibility of discrimination were an argument against the continuing in business of the agency having such possibility in its power our methods and means of transportation would be very restricted indeed.

As between the forwarding agent and the railroad the former is a shipper and entitled to all of the rights of a shipper. With the dealings between the forwarding agent and its customers the railroad company has nothing to do. If those dealings are of such importance to the public at large and so fraught with possibilities for discrimination as to render it necessary, they can be regulated by law as have been other phases of the transportation business. That argument is, however, one to be addressed to the legislative branch of the government.

We believe, however, that the possible evils arising out of discrimination by the forwarding agents between their patrons are largely imaginary. The evidence in this case shows that the charges by the forwarding agent for the same service are uniform and fairly measure the service performed in consolidating and shipping the goods. (Rec., 190, 191,

203, 205, 222, 223, 254, 260, 261.) In the nature of the case such charges must be uniform. Competition must make them so. The railroad business is in the nature of a monopoly. Experience has shown that the public is best served by allowing to the carrier operating on a line of railroad a monopoly of the business of transportation on that particular road. Considerations of public benefit render it expedient in this instance to eliminate the working of the principle of competition, upon which the business world largely relies to regulate its other affairs. The result is that it has become necessary to regulate such artificial monopolies by law to prevent discrimination and resulting business demoralization. No such monopoly, natural or artificial, exists in the business in which the forwarding agents are engaged. (Rec., 235, 264.) The business is open to all who care to engage in it and indeed, may be performed by the owners themselves. (Rec., 235, 264.) Discrimination is an evil which can flourish only under the favorable conditions of monopoly. It cannot exist when exposed to the rough conditions of competition.

The second aspect of the discrimination urged by counsel as resulting from the operation of the forwarding agent is the discrimination necessarily arising against the L. C. L. shipper unable for any reason to take advantage of the benefits of consolidation with other shippers to get the carload rate. This consideration seemed to the Interstate Commerce Commission in the Buckeye Buggy Co. case, *supra*, as the most important one in the case. The argument was, however, in that case held invalid. In reply to it the Commission said at page 629:

"It must, however, be borne in mind that the granting of a carload rate in any case is a discrimination against the less than carload shipper, who cannot avail himself of that rate. We can see no reason why a consignor who has the means to procure or produce a carload of carriages should be given a carload rating, while that rating is denied to a consignee who has the money with which to buy a similar carload. It must be noted further that if the privilege of combination is denied, the inevitable tendency is to drive the small carriage manufacturer out of existence altogether, and center the business in establishments which can produce all varieties and all kinds so that the purchaser can buy an entire carload at a single factory." (Italics are ours.)

We do not think the fallacy of appellee's argument can be better exposed than has been done in this quotation. If the operation of forwarding agents is a discrimination against the L. C. L. shipper, unfortunately situated, geographically speaking, much more is the carload rating as it now exists a discrimination against all L. C. L. shippers. In the former case an opportunity is given the L. C. L. shipper to in large degree overcome the disadvantages of his situation and to compete with the large manufacturer who is able to ship in carload lots. (Rec., 187, 188, 199, 200, 231, 232, 245, 246 247, 261, 262, 266, 280, 281, 282, 283.) The L. C. L. shipper unable to combine to get the carload rating is the exception. Is it possible that a practice can be an unlawful discrimination, which enables the large majority of small shippers to take advantage of the same favorable rates and conditions of shipment, enjoyed by the comparatively few and powerful, for the reason that some few small shippers are unable

to bring themselves under the same class? In the one case a very few are placed at a disadvantage in competing in the markets of the world. In the other a great number, it is safe to say, a majority of the manufacturers of the country are precluded from reaching any market save the local market. (Rec., 186, 187, 188, 199, 200, 202, 244-249 inc.)

There is no peculiar and intrinsic quality inhering in the character of the carload shipper which differentiates him from the less than carload shipper and puts him in a separate class by himself, entitled to more favorable consideration. He gets the more favorable rate solely and simply because the quantity of goods he has to ship and the conditions under which he is able to offer them for shipment enables the railroad to perform the act of carriage for him at less expense. The less than carload shipper, who must ship alone, is compelled to pay a higher rate because it costs the railroad company more to carry for him. Considerations of relative expense in this case override the natural equities of the case, namely, that all men should be put upon an equal footing. Surely it is a beneficent instrumentality that enables a vast number of producers, otherwise entitled to compete on an equal basis with the wealthy and powerful organizations of the country, to overcome the disadvantages of their position due to their financial weakness. And we submit that it is of vital importance to the public in general that such a result should be brought about. We believe that denying to the small shipper the right to consolidate with other small shippers as above set forth would have the result, as stated in the Buckeye Buggy Co. case, of driving

the small manufacturer out of business altogether and concentrating the business of the country into large establishments. (Rec., 231, 232, 186, 187, 188, 203, 272.)

It was held in *Central Yellow Pine Association v. Vicksburg, Shreveport & Pacific R. R. Co. et al.*, 10 I. C. C. Rep. 193, that the carrier has no concern with the manner or means by which merchandise is collected and tendered for shipment; and that allowance in rates cannot be made to various shippers for differing facilities in so collecting and tendering such merchandise for shipment. In that case the Commission speaking through Commissioner PROUTY, said at page 204:

"The claim is that the Kansas City Southern may properly allow this mill a reduced rate upon its product which shall compensate it for the cost of bringing those logs from the forest. It can make no difference what means are employed for that purpose; whether it be a railroad with an iron rail upon which the tractive power is a steam locomotive, or a tram road with a wood rail and mules for motive power; whether the logs be drawn by team or floated to the mill by water. If the right exists to make a lower rate upon the product as a method of compensating the mill owner for the expense of bringing the logs to his mill, it must be immaterial how they are brought there."

Said paragraph E is as follows:

"The extensive operation of forwarding agents, by reducing your orators' revenues, would compel them to raise their freight rates or diminish their service, necessitating a readjustment of long established relations between the carriers and shippers and among shippers themselves, to the injury of your orators' less

than carload shippers and patrons and your orators' business."

We do not believe any such far-reaching and radical results will follow as are anticipated by counsel for appellees. We believe that the railroad companies are standing in their own light and that the result would on the contrary be a net gain to them. The evidence amply shows that there is a great volume of freight which if consolidation is not allowed, will not move at all and will be a dead loss in tonnage to the railroads. The less than carload rate, together with slowness of transportation and damage to the goods in transit, prohibit altogether the shipment of certain classes of goods under the less than carload classification. (Rec., 186, 226, 245, 246, 261, 262.) But if it were assumed that there would be a loss in gross revenue resultant upon the declaring unlawful of the principle of consolidation, we doubt very much whether the result would be a net loss in revenue to the railroads. The same doubt is expressed by the Interstate Commerce Commission in the Buckeye Buggy Co. case, *supra*. The Commission says:

"Beyond doubt the carrier loses in gross revenue whenever the lower carload rate is applied to the movement of commodities which would otherwise move at the higher less than carload rate. Whether their net revenue is diminished depends upon a variety of considerations."

"We have been often assured, in some instances as the result of actual tests, that the cost of handling less than carload business was much more in proportion than the difference in rate." (Italics are ours.)

If this statement is true and we see no reason to disbelieve it, there will be no necessity for the radical and extensive readjustment of rates that counsel anticipate. But irrespective of whether or not there would result a net loss to the railroads, we contend that such net loss would be no argument against the principal of consolidation and the operation of the forwarding companies. If changed conditions of shipment render existing rates unjust to either carrier or shipper we submit that the rates should be readjusted and not an attempt made to arrest the development of trade and to force it into difficult, expensive and wasteful channels. In the case of *Brownell v. Col. & Cin. Mdld. R. R. Co.*, 5 I. C. C. Rep. 638, 652, Commissioner McDILL says:

"It is a sound rule for carriers to adapt their classifications to the laws of trade, that is, as before stated, if an article moves in sufficient volume *and the demands of commerce will be better served*, it is reasonable to give it a carload classification."

The same principle applies to the question under discussion. We draw a different conclusion than is drawn by counsel for appellees from the fact of the great number of shippers and the vast amount of traffic seeking the privilege of consolidation. We do not believe that a widespread and extensive need and demand can rightfully be an argument against allowing such demand, the sole reason being that the railroads have incorrectly gauged the needs of commerce and would suffer a temporary loss in readjusting their equipment to meet new conditions. It seems, rather, to us that the very magnitude and extent of the need is a strong reason for meeting and satisfying it.

Said paragraph F is as follows:

"The extensive operation of forwarding agents would result in economic changes, such as the elimination of small jobbers, that will injure the business interests of many of your orators' less than carload shippers and patrons and thereby your orators' business."

Counsel for appellees have continuously insisted that the operation of the forwarding companies would result in injury to the L. C. L. shippers. For some reason best known to themselves, and we fear somewhat disingenuously, they make all of the evils anticipated from the operation of the forwarding agents depend upon hypothetical injury to the business of the less than carload shipper. Upon his wrongs and the injustices heaped upon him is based the greater portion of their argument.

The only reason for this position that occurs to us offhand is that the less than carload shipper is the person whose protection is of the most vital importance to the public at large, the person most in need of protection, and the least able to defend himself; so that if some of his manifold wrongs can be laid at the door of the forwarding companies a strong case will be made out for the favorable consideration of the court.

We are unable to discover any facts appearing in this case upon which to base this contention of counsel. If the injury to the business of the less than carload shipper will approach the dimensions imagined by counsel for appellees, it is strange that no L. C. L. shipper has appeared in this proceeding from its inception before the Commission to the present time to complain of the operation of the

forwarding companies. The record, on the contrary, shows that the L. C. L. shippers of the country anticipate results diametrically opposed to those feared by counsel for appellees. One of the Interveners in this case, the Rockford Manufacturers' and Shippers' Association, is itself an L. C. L. shipper and presumably is seeking its own best interests. Several L. C. L. shippers appeared before the Interstate Commerce Commission at the hearing of this case, and gave testimony as to their situation and views and as to the inevitable result on their business of the enforcement of the rules in question. (Rec., 183, 198, 243.) We are not aware of a single instance of a less than carload shipper expressing views to the contrary. The truth of the matter is, that this battle is waged against the less than carload shipper. Out of his pocket must come the less than carload freight charges. He is the man whose market is to be restricted, and who is to be removed as a possible competitor of the powerful manufacturer who can ship under carload classification. The argument of counsel is an unsuccessful attempt of an enemy to enroll under the standard of the small manufacturer and shipper. We do not think any one has been deceived, and that the attitude towards the matter, held by counsel themselves, is one of strategic expediency, rather than of sincere belief.

As to the elimination of the jobber, large or small, we do not believe any such result would accrue from the operation of the forwarding companies. The continued existence and prosperity of the jobbers on the Pacific Coast, concurrently with the opera-

tion of the forwarding companies in that section of the country, should be sufficient refutation of the argument. A brief examination of the principles involved will, we believe, lead to the same conclusion. We submit that the fundamental reason for the difference between the C. L. and L. C. L. rates is the difference in cost of carriage of the goods. As long as this difference in cost exists, so long will the difference in rate exist, and the difference in cost in the two classes of transportation to the Pacific Coast, being based largely on the continued existence of the long rough haul through the mountainous districts of the West, may be said to have a fair prospect of permanence. We submit that the operation of the forwarding company does no more than to place the Pacific Coast jobber on an equal basis with the manufacturer of the Middle West, and makes possible the existence of competition between the two. There is, and in the nature of the case always must be, a large and legitimate field for the operation of the jobber. Emergency orders and orders for very small quantities of goods must always be made from some source of supplies near at hand. In this field the jobber must necessarily have a monopoly. In the other branches of the business, the jobber is subject to competition with the manufacturer. This competition, we believe, for the best interests of the public should continue.

The result of prohibiting the operation of the forwarding companies would be, it is granted by counsel, to eliminate the trade between the Pacific Coast consumer and the Middle Western manufacturer. In other words, the result would be to give

the large jobbers a monopoly of the situation. The probable response of counsel to this statement of the situation will be, that competition between the jobbers themselves will protect the consumer from any evil effects of such a monopoly. But prohibition of operation of the forwarding companies will have another effect. It will inevitably result in the elimination of the small jobber, the greatest patron of the forwarding companies, at the present time. Deprived of the privilege of making consolidated shipments no jobber can exist whose business is not sufficiently extensive to justify him in purchasing merchandise of different manufacturers in carload lots. The end of the story is absolute monopoly by the large jobbers of the Pacific Coast trade. Such a result is, we submit, hostile to the interests of the public at large, and one not to be countenanced by this court.

Said paragraph G is as follows:

"False billing and false classification are more prevalent in carload shipments by forwarding agents than in carload shipments of single ownership, and your orators would be subjected to greater expense and vigilance in detecting and preventing such practices."

This statement is absolutely unsupported by any evidence in the record. We are unable to see how any greater difficulty would be experienced by the railroad companies in detecting and preventing false billing and false classification. In this matter much must be left to the integrity and honesty of the shipper in any event. It is our idea that less difficulty would be experienced in this regard by the railroads, for the reason that the goods, when packed

by the forwarding companies, are as a rule packed in a more orderly and systematic manner than when packed by the actual owners, and for the further reason that the forwarding companies are well known, responsible and easily accessible to investigation. The forwarding agent is, of course, in its dealings with the carrier, a shipper and is punishable in the same manner as any other shipper for a violation of the Elkins Act, Hepburn Act, or any other act regulating interstate commerce.

In this connection we wish to suggest that the extreme difficulty of ascertaining the true ownership of goods tendered the carrier for shipment, if existent, is to our mind a strong argument against the rules which make such an investigation necessary. Rules which according to the contention of counsel are so easily and successfully evaded as the rules in question, must inevitably furnish a safe cover for unlawful discrimination and preferment of favored shippers by the railroads themselves. We have seen nothing in the history of railway transportation in the United States to warrant the belief that such rules can or will be impartially enforced.

One more point brought out strongly by the evidence and practically conceded by counsel for appellees (Rec., 251) we wish to dwell upon briefly in our discussion of these questions of policy. The evidence established the fact that many lines of goods such as household goods and new furniture and many other classes of fragile goods could not be transported successfully long distances, except under carload conditions of shipment owing to the

extremely large proportion of such goods broken and damaged in transit (Rec., 184, 186, 187, 189, 237, 238, 188, 199, 200, 201, 245, 246, 247, 248, 261, 262, 266) and that other lines of goods, such as elevators, for instance, which must be installed within a contract time limit, cannot be shipped under the L. C. L. classification subject to the slow and uncertain deliveries of this class of shipment. (Rec., 199, 200, 201.) These considerations are entirely irrespective of any question of rate whatever. These and kindred classes of goods demand the carload conditions of shipment of goods if they are to move at all. The railroads have within very limited bounds provided through car service for L. C. L. shipments between certain points in the East to obviate the difficulty here presented. This service is in the nature of the case very limited, and does not touch the bulk of this traffic. The needs of this class of traffic make a strong claim for favorable consideration at the hands of the court. The difficulties of the situation are, however, but a single illustration of the impossibility of any other test being made for the classification of goods for transportation, other than that test so often reiterated in this brief, namely, the circumstances and conditions attending the actual carriage of the goods themselves.

In conclusion, we wish to refer briefly to the proceedings in this case had before the United States Circuit Court for the Southern District of New York, in which the injunction now before this Honorable Court on appeal was granted. We feel sure that an examination of the record will furnish convincing

proof that the injunction in this case was not granted because the Circuit Court believed there was a substantial dissimilarity in circumstances and conditions of the physical carriage of the goods, but because the Circuit Court was of the opinion that it might rightfully, and as a matter of fact did, take into consideration other matters affecting or supposedly affecting the interests of carriers and the public in general.

The bill for injunction was framed on this theory. The allegations of the bill follow with painstaking exactness the argument of Chairman Knapp in his dissenting opinion in this case before the Interstate Commerce Commission. This opinion was a part of the record in the injunction suit upon which the appeal now before this Honorable Court is based, and, in granting the prayer of the bill, drafted in harmony with this opinion, the Circuit Court relied largely, if not entirely, on the argument of the Chairman, therein contained. The Circuit Court, in granting the preliminary injunction, frankly acknowledges its indebtedness to the Chairman for its views on the question at issue, using the following language (Rec., 299):

“A majority of the court is in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and do not think it necessary to add anything to his exhaustive discussion of the questions presented.”

The opinion relied on ignores absolutely the question as to whether or not the circumstances and conditions of the physical transportation of a carload of goods when shipped by a forwarding agent in the

manner shown by the record in this case are substantially similar to the circumstances and conditions of transportation of a like car of goods, when the ownership of the goods is vested in either the consignor or consignee.

The Chairman does not even refer to the great mass of testimony taken before the Commission on this question supporting the contention of the Interveners. To support his contention, he takes the position rendered logically necessary by the overwhelming character of this evidence, namely, that such evidence is immaterial and that the case must turn upon other questions. In order to escape an adverse finding of fact, he is driven to an untenable position of law. The order of the Circuit Court, like the opinion on which it is based, is, we submit, founded on an erroneous proposition of law, and not upon a finding of fact adverse to Interveners.

Inasmuch as the argument in the opinion of Chairman Knapp has been explicitly approved by the court granting the injunction in this case, we venture to discuss a few of the points made in that argument.

The discussion by the Chairman of the English cases seems to us particularly unsatisfying.

On page 448^{149.C.C.R.10.} of the opinion of the Chairman, in discussing the case of *Great Western Ry. Co. v. Sutton*, 4 Eng. & Irish App. 226, he intimates that much of the weight of our argument rests upon the finding of fact in that case, which finding of fact would not be binding upon the Commission. We have never taken such a position and refuse to allow ourselves to be forced into it by even such respectable author-

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ity as the Chairman of the Interstate Commerce Commission.

The value of that case as supporting the position here taken by the Interveners lies not in the fact that the English jury found in favor of the intercepting carrier, but in the instructions which were given the jury by the trial court and approved by the House of Lords. It is very true that the conclusions of twelve men in an English case as to matters of fact there involved would probably not be allowed to preclude our courts from investigating the facts for themselves. But the rules of law which were imposed upon that English jury for their guidance in determining those questions of fact, which rules of law were approved by the House of Lords and adopted by Congress as a part of our Act to Regulate Commerce; these stand on a far different basis. These, we submit, are, under the decisions of this court, binding on the Interstate Commerce Commission and this Honorable Court.

The principle involved in these instructions which the Chairman appears to have overlooked, is stated and restated by the various justices in so many different ways that we fail to see how it could be misunderstood. The jury were instructed that in determining the question of similarity or dissimilarity they were to consider those facts alone which bore on the carriage of the goods affecting the risk, expense and burden to the carrier of such carriage.

The analogous case supposed by the Chairman on page 450 of the dissenting opinion does not strike us as being particularly happy. The exact basis for the legality and allowance of "packed parcel" classi-

fication in the Sutton case is not entirely clear. Certain it is, however, that it was not the fact of ownership or lack of ownership of the goods. The long line of cases cited by the various justices with approval, expressly prohibiting any difference in rate based on such a distinction, absolutely forbids such a supposition. The Chairman's analogous case breaks down in assuming that the railroad companies are warranted in making a higher charge than the regular carload rate, for the transportation of a carload of goods, based on the question of ownership of the goods, and irrespective of any substantial dissimilarity in the circumstances and conditions of the physical carriage of the goods. We have no "packed parcel" rate in this country. Our rates are based on the carload as a unit of transportation and are either carload or less than carload. The applicability of these carload and less than carload rates is the question at issue in the case at bar, and whether or not the railroads can charge one person a higher rate for transportation of a carload of goods than it charges another person for transporting the same car. The test is whether or not the shipper can qualify as a carload shipper, namely, present his goods for shipment within the requirements of the carload classification. If he can, any charge made him above the regular carload charge is unlawful. The physical composition of a consolidated car and a straight car, as a general thing, differ not at all. The sole difference lies in the matter of ownership of the goods. That difference has been shown by the evidence not to constitute a substantial dissimilarity in circumstances and conditions of carriage of the goods. In view of this fact

it is idle to say that there is no unlawful discrimination by the railroads because they "provide the same rate for all consolidated carloads, namely, the less than carload rate on the various packages."

The many other English cases cited and discussed in this brief which go fully into the questions of the ownership and composition of so-called "packed parcels" as constituting a dissimilarity are entirely omitted by the Chairman in his discussion. Such omission was absolutely necessary to the integrity of the Chairman's argument, for the cases cannot be distinguished and their logic is unanswerable.

The discussion of our own cases construing Section 2 of the Act to Regulate Commerce is to our minds equally unsatisfactory. While some of the earlier cases use language intimating that circumstances and conditions other than those affecting the matter of carriage of the goods might be taken into consideration in construing Section 2 of the act, we believe that such language was inadvisedly used, and not necessary to the determination of the issues involved. And further, we submit that in the later cases construing the section no warrant will be found for the construction urged by the Chairman. The Party Rate case was obviously decided on considerations affecting the matter of carriage alone, namely, reduced cost of furnishing tickets and handling the same and the increased profit due to the purchase of a large amount of transportation at one time. The "wholesale principle" in transportation has always been considered, and properly so, a circumstance attending the carriage itself.

The Import Rate case involved a construction of

Section 4 of the Act to Regulate Commerce, under which section there is no dispute but that matters, other than those affecting the carriage of the goods, may be considered. The case was decided under this section and what was said about Section 2 of the act was *dictum*.

In discussing the other decisions handed down by this Honorable Court passing on the questions under discussion, the sole recourse of the Chairman is to seek to enlarge the meaning of the words "matter of carriage" as used in those cases. We do not believe that any such enlargement can properly be made. We believe that "carriage" in this connection means transportation from point of origin to point of destination, and no more, and that "matters of carriage" are matters affecting this transportation. That the meaning of the term "carriage of goods by railroad" must be confined to the limits above outlined has received judicial authority.

I. C. C. v. Detroit, etc., Ry. Co., 167 U. S. 633, 643, affirming 74 Fed. 803, 813, and *Pennsylvania Ry. Co. v. Knight*, 192 U. S. 21, 28.

To adopt the meaning of the words contended for by the chairman would be to wipe out all difference between the meaning of the words "circumstances and conditions" as used in Section 2 and the same words as used in Section 4 of the act. That a broad distinction between the two should be recognized and maintained has been held by this court in the Alabama Midland case, *supra*. The statement of the scope and purview of the two sections of the act was there clearly and unambiguously and, we believe,

correctly set forth. In the light of this case we can see no ground for the construction of said Section 2 urged by the Chairman. We believe that, had the Circuit Court correctly apprehended the principles of law involved in the case at bar, it would have taken a totally different view of the evidence before it, and the injunction would have been refused.

Respectfully submitted.

MAZZINI SLUSSER,

*Attorney for Appellants, The American
Forwarding Company, Transconti-
nental Freight Company, and Rock-
ford Manufacturers' and Shippers'
Association.*

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Argument for Appellant.

INTERSTATE COMMERCE COMMISSION v. DEL-AWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 325. Argued February 25, 28, 1910.—Decided April 3, 1911.

The conclusions of the Interstate Commerce Commission on questions of fact are not reviewable by the courts. *Balt. & Ohio R. R. Co. v. Pitcairn*, 215 U. S. 481.

A carrier cannot make mere ownership of goods tendered for transportation the test of the duty to carry, nor may a carrier discriminate in fixing charges for carriage upon such ownership.

Under the act to regulate commerce a carrier cannot refuse to transport carload lots at carload rates because the goods do not actually belong to one shipper or are shipped by a forwarding agency for account of others.

The provisions of § 2 of the act to regulate commerce, were substantially taken from § 90, the equality clause of the English Railway Clauses Consolidated Act of 1845, and had been construed by the courts prior to the enactment of § 2 as forbidding a higher charge to forwarding agents than to others.

The right of the carrier to fix rates does not give it the right to discriminate as to those who can avail of them.

The conclusion by the Interstate Commerce Commission that the enforcement of a rule by a carrier creates a discrimination is one of fact and not open to review by the courts.

In the absence of statutory authority to exclude forwarding agents from availing of published rates the courts cannot overrule a conclusion of the Interstate Commerce Commission that such exclusion would create a preference; and this although the business of forwarding agents be competitive with the carrier itself.

THE facts are stated in the opinion.

Mr. Wade H. Ellis, assistant to the Attorney General, with whom *Mr. P. J. Farrell* and *Mr. Edwin P. Grosvenor* were on the brief, for appellant Interstate Commerce Commission:

The power exercised by the Commission in this case

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was within the authority conferred by the Hepburn Act of June 29, 1906, 34 Stat. 584, §§ 2, 13, 15. The Circuit Court rendered no opinion beyond stating that a majority of the court were in accord with the reasoning expressed in the dissenting opinion of the chairman of the Commission. This dissenting opinion challenged merely the expediency of the order. But the order being "within the scope of the delegated authority under which it purports to have been made," the question of the expediency was not for the court to pass upon. *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452. See also *Honolulu Rapid Transit Co. v. Hawaii*, 211 U. S. 282; *Knoxville v. Water Co.*, 212 U. S. 1, 8, 18; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41; *San Diego Land Co. v. National City*, 174 U. S. 739; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 397.

The Commission ordered the defendants to cease from refusing to apply their carload rates to carload lots consisting of packages of various ownership tendered as a single shipment by one consignor to one consignee, and to desist from making ownership or lack of ownership of property tendered for shipment a test as to the applicability of a carrier's rates, because by such practices they were discriminating "in the transportation of a like kind of traffic under substantially similar circumstances and conditions." The Commission did not err in holding that the words "similar circumstances and conditions" refer to matters of carriage and that the ownership of the property transported is not a fact to be taken into consideration. *Wight v. United States*, 167 U. S. 512, 518; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 166.

Section 2 was passed to prevent the same discrimination prohibited by § 90 of the English act, known as the "Equality Clause," and this court will presume that

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Congress in adopting the language of the English act had in mind the construction given to that act by the English courts. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.*, 145 U. S. 263; *McDonald v. Hovey*, 110 U. S. 619. The construction of the English courts is the same as that here contended for. *Great Western Ry. Co. v. Sutton*, L. R. 4 H. L. 226; *Evershed v. London & Northwestern Ry. Co.*, 3 App. Cas. 1029; *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Ry. Co.*, 11 App. Cas. 97.

One who is rightfully in possession of personal property, with authority to ship it in his own name, is a person within the meaning of § 2. *United States v. Mil. Refrigerator Transit Co.*, 145 Fed. Rep. 1007.

A carrier may not properly look beyond the transportation to the ownership of the traffic as a basis for determining the applicability of its rates. If this court should hold that § 2 applies only where either the consignor or the consignee is the actual owner of all the goods included in the shipment, the carrier would be free to practice much discrimination which could otherwise be prevented. If such holding were made it is apparent that the application of § 2 would depend not upon the language used by Congress but upon the will of the carrier to whom the shipment might be tendered for transportation.

The function of a railroad is merely to transport, and it was not contemplated that the railroad should be concerned with what happens before or after transportation.

Mr. Mazzini Slusser for an appellant shipper submitted.

Mr. Walker D. Hines, with whom *Mr. William S. Jenney* was on the brief, for appellees:

The Commission erroneously held that § 2 of the act

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requires the same duties to forwarding agents as to the shipping public.

The differential between the carload and less than carload rates is of legal interest to the shipper, but not to the forwarding agent. As to the latter the differential is a mere accident.

Loading, unloading, billing and accounting, respecting less than carload services (which the forwarding agent seeks to perform), are part of the transportation service and at common law the carrier has the right to exclude others from performing such services in competition with it. Similar cases are: *Chicago &c. R. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79; *Central Stock Yards Co. v. Louisville & Nashville Ry. Co.*, 118 Fed. Rep. 113; *Lundquist v. Grand Trunk Western Ry. Co.*, 121 Fed. Rep. 915; *Johnson v. Dominion Express Co.*, 28 Ontario Reports, 203.

Fundamentally the same doctrine was applied by the *Express Cases*, 117 U. S. 1. The English doctrine to the contrary has no bearing, because squarely in conflict with the common-law doctrine in this country as declared in the *Express Cases*. Hutchinson on Carriers, §§ 514-517.

The act to regulate commerce has not changed the common law in this respect. *Baltimore & Ohio Ry. Co. v. Voight*, 176 U. S. 498, 509.

The act to regulate commerce seeks to secure equality between shippers. *United States v. Wight*, 167 U. S. 512, 518; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 219; *Brownell v. C. & C. M. Ry. Co.*, 4 I. C. C. Rep. 285, 292. The forwarding agent is not the real shipper, and his interest in the shipment is analogous to that of the railroad company.

The Commission erroneously construed § 2 to exclude from consideration all differentiating elements except circumstances pertaining to the character of the goods and the destination.

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Not even the English cases sustain this view of the English equality clause.

But the English cases do not control the construction of § 2 of our act, because this section was not taken from the English act, but is radically different and has been given a radically different construction by this court. *Interstate Commerce Commission v. Baltimore & Ohio Ry. Co.*, 43 Fed. Rep. 37, 44, 46, 47, 49, 54, 59, 61; *S. C.*, 145 U. S. 276, 280, 282, 283; *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 217, 218, 219. A comparison of these cases with *Phipps v. London & Northwestern Ry. Co.*, L. R. 2 Q. B. D. 229, 249, shows the extraordinary contrast between this court's liberal construction of § 2 and the narrow construction placed by the English courts upon their equality clause. The English cases have never been approved or followed in this country as to § 2. *United States v. Wight*, 167 U. S. 512, and *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, are entirely consistent with the liberal construction of § 2 adopted by this court.

The Commission's construction of § 2 is in irreconcilable conflict with this court's repeated declarations as to the spirit and purpose of the act to regulate commerce. *C., N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 197; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 172; *Southern Pacific Ry. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 554; *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 209 U. S. 108, 119.

The adoption of the Commission's erroneous construction of § 2 would destroy many traffic arrangements of great importance to the public.

The Commission's order was unlawful because it rested upon an erroneous construction of § 2, under which erroneous construction the Commission absolutely excluded from consideration the factors which the carriers pre-

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sented and which, under the statute and the decisions, the carriers were entitled to have the Commission consider.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Was the court below wrong in permanently enjoining the enforcement of an order of the Interstate Commerce Commission directed to the railroad companies who are appellees, is the subject which this cause requires us to consider. As a preliminary to stating the proceedings before the Commission and the court, we refer to practices under the act to regulate commerce which gave rise to and developed the controversy with which the order of the Commission was concerned. To do this will not only abbreviate the statement of the case, but will serve to broadly define the one question essential to be decided and point to the principles applicable to its correct solution.

Before the act to regulate commerce it was usual, first, to give reduced rates to persons who shipped quantities of merchandise; and, second, to charge a proportionately less rate for a carload than was asked for a shipment in less than a carload. After the act lower rates to wholesale shippers were abandoned, it having been declared that to continue them was contrary to the act. *Providence Coal Case*, 1 I. C. C. Rep. 107. The giving, however, a lesser proportional rate for a carload than for a less than carload continued, the Commission having at an early date announced that such a practise was not prohibited. *Thurber v. N. Y. C. & H. R. R. Co. et al.*, 3 I. C. C. Rep. 473. Without detailing the theory upon which this conception was based it suffices broadly to say that it embodied the assumption that a carload was the unit of shipment, and rested upon the difference which existed between the cost of service in the case of a carload ship-

ment by one consignor to one consignee and that occasioned by a shipment in one car of many packages by various consignors to various consignees. Leaving aside possible qualifications arising from exceptional conditions, it is true to say that the Commission, however, recognized that the fixing of a lesser rate for a carload was not imperative, but was merely optional. Conformably to these administrative conceptions it came universally to pass that wherever a lesser charge for a carload than for a less than carload shipment was established such charge was only applicable to shipments made at one time by one consignor of merchandise consigned to one consignee at a single destination. While there was this uniformity there was, however, much divergence between carriers as to the character of traffic which was given the benefit of the lesser rate for carload shipments and the circumstances under which, when such rate was established, it would be applied. This becomes at once manifest when the rules are considered which prevails in the three geographical divisions into which the United States came to be divided by carriers in order that a similar classification might, in a general sense, obtain under like conditions. The divisions in question are the Southern, the Western and the Official Classification territory, the first including practically all points east of the Mississippi River and south of the Ohio and Potomac Rivers; the second embracing that part of the country west of the Mississippi River and the Great Lakes and an imaginary line extending from St. Louis to Chicago, and the last all of the United States not covered by the two other divisions. In the Southern and Western Classification territories the rules established by carriers allowed the lesser rate for a carload shipment only on a small percentage of the classified articles, and in both these territories restrictions were imposed prohibiting the intermingling of differently classified articles in one car for the purpose of

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obtaining the carload rate, even though the articles, if they had been shipped separately in carload quantities, might have been entitled to the carload rate. The extent of these limitations upon the right to enjoy the lesser rate for the carload in the territories in question is shown by a statement made by the then chairman of the Interstate Commerce Commission, in the dissenting opinion delivered by him in *Export Shipping Co. v. Wabash R. R. Co.*, 14 I. C. C. Rep. 437, 443, viz.:

"A recent careful and authoritative examination of the several classifications shows that in the Southern Classification there are 3,503 less than carload and only 773 carload ratings, the carload ratings being 22.1 per cent of the less than carload; in the Western Classification there are 5,729 less than carload and only 1,690 carload ratings, the carload ratings being 29.8 per cent of the less than carload."

In the same opinion it is also stated that in both the Western and Southern Classification territory the small percentage accorded a carload rate was confined to goods embraced within lower grades of classification, taking therefor the lowest rates. In the Official Classification territory, however, a widely different allowance of carload ratings prevailed, since in that territory the carload rating was permitted on a very large number of articles. In that territory, as likewise remarked by Chairman Knapp, "there are 5,852 less than carload ratings and 4,235 carload ratings, the carload ratings being 72.4 per cent of the less than carload" against, as we have said, 25.8 per cent and 22.1 per cent in the other territories. This large difference was besides in effect made much greater not only by the higher grades of traffic to which the carload rate was extended, but also because of the enlarged right to ship in one car articles embraced in various classes of traffic to which the carload rating was extended.

There can be no doubt that the privilege of shipping at

a lesser rate for the carload shipment than was asked for a less than carload shipment came to be interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association and to aggregate and ship them in carload lots in the name of one consignor to a single consignee at one destination by the use of commission houses, storage and other companies, etc. It is also undoubted that in consequence of the facility of shipping at a lesser rate for a carload than for a less than carload shipment there developed a class of persons known as forwarding agents, who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments, such agents relying for their compensation upon what they could make from the difference between the carload and less than carload rates. The business so carried on by these agents was thus described by Mr. Commissioner Knapp in his dissenting opinion, to which we have previously referred (14 I. C. C. Rep. 440):

"The business of the forwarding agent, in so far as is material to the question involved, is to collect less than carload shipments from different consignors, combine such shipments into carloads, and ship the same in the name of the forwarding agent, or of the owner of one of the less than carload shipments, to one consignee, who may be the forwarding agent himself, another forwarding agent at the point of destination with whom he has business relations, or the owner of a part of the property transported. The consignee of the shipment, whoever he

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may be, receives the carload and distributes its contents to the parties for whom they are intended. The forwarding agent finds his compensation and profit in the difference between the carload and less than carload rates.

"The saving effected by securing application of the carload, rather than the less than carload rates, may be divided between the forwarding agent and his customer in any agreed proportion. To the extent that the customer secures the carriage of his property at a lower rate than the less than carload rate, which would otherwise be applied, he saves money, and the division of the difference between the carload and the less than carload rates is a matter of private bargain between him and the agent."

The extent to which the right to avail of the carload rating in the various modes above stated had come to be a part of the business of the country is described in the opinion of the Commission in *California Commercial Association v. Wells, Fargo & Co.*, 14 I. C. C. Rep. 442, delivered on the same day that its opinion concerning this controversy was announced. The Commission said (p. 433):

"Few practices have become more firmly established in the transportation world than that of combining small quantities of freight of various owners and shipping at the relatively lower rates applicable to large consignments, and under this practice has developed an immense volume of traffic which otherwise could never have been brought into being. It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of the smaller industries and more surely establish the dominance of the greater industrial and commercial institutions."

And the alertness with which those engaged in commerce utilized every means afforded of shipping at lower cost is shown in the following statement made by Mr.

Commissioner Knapp in his opinion to which we have referred (14 I. C. C. Rep. 441):

"The individual shippers are not necessarily located at the same point, nor are the individual consignees. For instance, if a reduction in rates could be effected a furniture dealer at Grand Rapids, Mich., having a shipment for a point in Maine, and a furniture dealer in Rockport, Ill., having a shipment for a point in Massachusetts, might forward their separate shipments at less than carload rates to Chicago; there the two shipments would be consolidated and forwarded at carload rates to Boston; and thence shipped again at less than carload rates from Boston to their respective destinations."

It is obviously true that the extent to which the practice prevailed of combining shipments to avail of the benefit of the less than carload rate differed largely in the various territories, dependent upon the liberality of the tariffs on the subject. That is to say, in Official Classification territory, where the right to less than carload rates was extended to many items and the right to combine different articles in one shipment was more liberal than in the other territories, the business of combining diverse shipments into carload lots assumed much greater magnitude than in the other territories. However, about 1899, in Official Classification territory rules were adopted restricting the liberal right to obtain less than carload rates and the extended power to combine like or different articles in a carload, the restrictions probably having been brought about by the development of the business of forwarding agents. *The Buckeye Buggy Company v. C., C. & St. L. Ry. Co.*, 9 I. C. C. Rep. 620. The modifications in question which took the form of notes, to Rule 5-B and to Rule 15-E of the Official Classifications which regulated carload shipments, in effect forbade the combination of goods belonging to several owners for the purpose of a carload shipment and forbade therefore not only impliedly

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but expressly the combination of goods for the purpose of carload rating by means of forwarding agents. The notes were as follows:

"Rule 5-B. In order to entitle a shipment to the carload rate, the quantity of freight requisite under the rules to secure such carload rate must be delivered at one receiving station, in one day, by one consignor, consigned to one consignee and destination, except that when freight is loaded in cars by consignor it will be subject to the car-service rules and charges of the forwarding railroad. (See note.)

* * * * *

"Note. Rule 5-B will apply only when the consignor or consignee is the actual owner of the property.

"Rule 15-E. Shipments of property combined into packages by forwarding agents claiming to act as consignors will only be accepted when the names of individual consignors and final consignees, as well as the character and contents of each package, are declared to the forwarding railroad agent, and such property will be waybilled as separate shipments and freight charged accordingly. (See note.)

"Note. The term 'forwarding agents' referred to in this rule shall be construed to mean agents of actual consignors of the property, or any party interested in the combination of I. C. L. shipments of articles from several consignors at point of origin."

While the restrictions in question were adopted in 1899, from that time to about 1907, when the shipments which provoked this controversy were made, it would seem that there was no general effort to enforce the restrictions, although sporadic attempts to do so were undoubtedly made. The business, therefore, of aggregating the shipments of various owners, for the purpose of obtaining the benefit of the carload rate by all the means and devices which we have hitherto described, continued

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substantially unchanged. The *Buckeye Buggy Company Case*, *supra*. See also statement in the dissenting opinion of Mr. Commissioner Knapp in the present case. 14 I. C. C. Rep. p. 442.

In the spring of 1907 the Export Shipping Company, a New Jersey corporation doing business in Chicago and in New York, shipped from Chicago to New York, by the several railroads who are appellees, three cars of freight, consisting of merchandise belonging to various owners which had been aggregated by the Export Company for the purpose of shipment, and thus becoming entitled to the carload rate. The shipments conformed in all respects to the regulations of the companies except to the extent that they came under the operation of the restrictions above referred to. On the arrival of each car in New York the carrier, instead of collecting the carload rate, exacted the less than carload rate, because of the restrictions in question. In August, 1907, the Export Company petitioned the Interstate Commerce Commission to award it reparation against the three carriers to the extent of the difference between the less than carload rates, which had been exacted and the sums which would have been paid if the carload rate had been demanded. The right to the relief was based upon the assertion that an unlawful discrimination had been occasioned. The railroad companies having answered, the three complaints were consolidated and heard at the same time. When the hearing had somewhat proceeded it was agreed that the petitions for reparation should be considered as having been amended so as to challenge the reasonableness of the restrictions referred to. After the case had been submitted to the Commission the Rockford Manufacturers' Shippers' Association of Rockford, Illinois, the Manufacturers' Association of Jamestown and the Judson Freight Forwarding Company were allowed to intervene, and the case was reopened and further testimony was re-

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ceived in support of and against the contention that the assailed rules were in conflict with the second section of the act to regulate commerce.

The Commission, at the time the complaints were pending, had also before it the complaint of the California Commercial Association against Wells, Fargo & Co., involving an analogous question. On June 22, 1908, the report, opinion and order of the Commission in both cases were filed. 14 I. C. C. Rep. pp. 422, 437.

The general subject under consideration in this case was more elaborately discussed in the opinion in the California case and in the opinion in this case reference was made to the reasoning expounded in that case. The restrictions created by the rules to which we have referred were declared void and reparation was awarded. The carrier was commanded on or before a date named to desist from attempting to enforce the restrictions. Two members of the Commission dissented. Briefly stated, the Commission held, (a) that a carrier could not properly look beyond goods tendered to it for transportation "to the ownership of the shipment," as the basis for determining the application of its established rates, because doing so would be a violation of the second section of the act to regulate commerce; (b) that the fact that the carriers in Official Classification territory had voluntarily established both liberal carload rates and opportunities for combining various articles for the purpose of obtaining the carload rate, gave the carriers no right to discriminate by depriving one person or class of persons of the right thus granted; (c) that a forwarding agent was equally entitled with others to the benefit of a carload rate when published and established and that to deprive a forwarding agent of such rights would be a prohibited discrimination; (d) that in any view the restrictions formulated by the assailed rules were void because repugnant to the act to regulate commerce, since their enforcement as a matter of fact neces-

sarily created preferences and engendered discriminations which the act forbade; (e) that this, among other reasons was the case because the enforcement of the assailed restrictions would not only create preferences in favor of one set of persons against another but would create discriminations between places and would be revolutionary in its operation upon interstate traffic; (f) that irrespective of the abstract right of a carrier to make the ownership of goods offered for shipment a basis for applying its published rates, owing to the practical impossibility of a carrier being able to adequately enforce such a rule by determining who was the owner of the goods offered, such a rule as a matter of fact would in and of itself be an unlawful preference and discrimination forbidden by the act; and (g) that the same principle would control as to the attempt to establish a rule applicable alone to forwarding agents, because of the practical impossibility of distinguishing one class of agents from another. The reasons which led two members of the Commission to dissent were expounded in a careful opinion, stating views which were in substance the direct antithesis of those expressed by the Commission. For example, the dissenting opinion maintained first, that to deprive a carrier of the power to exclude a forwarding agent from the benefit of the carload rate would bring about discrimination against places and preferences in favor of persons prohibited by the act; second, that as the right to the carload rate was the offspring of the voluntary act of the carrier the right to restrict the privilege thus accorded to particular classes or conditions necessarily obtained; and, third, that in any event a forwarding agent who was but a dealer in railroad transportation, and therefore in a measure a competitor in business of a railroad carrier, was not within the prohibitions of the second section of the act to regulate commerce.

The railroad companies did not comply with the order

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and before the date fixed for compliance commenced the present suit by filing their joint bill to enjoin the enforcement of the order and have it declared void. It suffices to say in substance that as a basis for the right to relief the bill challenged the propositions upon which the Commission had based its order and affirmatively propounded the grounds which led two members of the Commission to dissent from the conclusions of that body. It also suffices to say that the answer of the Commission traversed the affirmative grounds for relief asserted in the bill and averred the correctness of the order by it made upon the grounds stated in the opinion and report of that body. The order of the Commission and its report and opinion in this particular case, as also its opinion in the California Commercial Association case, which, as we have said, was decided on the same day, was made part of the answer, and the opinion in the Buckeye Buggy Company case was also attached.

A motion for a preliminary injunction was heard before the Circuit Court, composed of three judges, upon the pleadings, the affidavits of two officials of one of the complainant railroad companies and the evidence taken before the Commission. The motion was granted, and the enforcement of the order of the Commission was restrained until final hearing. The Circuit Court rendered no opinion other than the statement that a majority of the court were in accord with the reasoning and conclusions expressed in the dissenting opinion of the chairman of the Commission, and that they did not think it necessary to add anything to his exhaustive discussion of the questions presented. Thereafter the American Forwarding Company, Transcontinental Freight Company, and the Rockford Manufacturers' and Shippers' Association, were made parties defendant, and those concerns filed an answer, which adopted the averments contained in the answer of the Commission. Replications were duly filed. A decree

pro confesso was entered against the Export Shipping Company and its trustee in bankruptcy, the company having become bankrupt.

Adopting a suggestion made by the court in disposing of the motion for a preliminary injunction, it was stipulated between the solicitors for the various parties that the case should be treated as having been submitted for final hearing. Thereupon a final decree was entered, by which the order of the Commission was set aside and declared to be void. This appeal was then taken.

As shown by the opinion of the Commission and that of the two members who dissented, there were many and wide differences in the views expressed. On their face, however, when ultimately reduced, they will be found, in so far as they are here susceptible of review, to rest on but a single legal proposition, that is, the right of a common carrier to make the ownership of goods tendered to him for carriage the test of his duty to receive and carry, or what is equivalent thereto, the right of a carrier to make the ownership of goods the criterion by which his charge for carriage is to be measured. We say the contentions all reduce themselves to this, because in their final analysis all the other differences, in so far as they do not rest upon the legal proposition just stated, are based upon conclusions of fact as to which the judgment of the Commission is not susceptible of review by the courts. *Baltimore & Ohio R. R. v. Pitcairn*, 215 U. S. 481. This at once demonstrates the error committed by the lower court in basing its decree annulling the order of the Commission upon its approval and adoption of the reasons stated in the opinion of the dissenting members of the Commission. This follows, since the reasons given by the dissenting members, except in so far as they rested upon the legal proposition we have just stated, proceeded upon premises of fact, which, however cogent they may have been as a matter of original consideration, were not open to be so

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considered by the court because they were foreclosed by the opinion of the Commission. Doubtless the mistake of the court below in this respect was occasioned by overlooking the scope of the Hepburn Act, and because the decision below was made in June, 1909, before the announcement of the opinion in the *Pitcairn Case*. The reasons above stated also serve to narrow the contentions pressed at bar, since such conditions likewise in their essence but reiterate the conflict of opinion which developed in the Commission, but which for the reasons stated are for the purpose of our review substantially reducible to the one legal question which we have stated. We shall therefore confine ourselves to a consideration of that question and to such brief notice of the other contentions urged as will make clear that they depend ultimately upon conclusions of fact not open in this court for review.

The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. We say this because it is impossible to conceive of any rational theory by which such a right could be justified consistently either with the duty of the carrier to transport or of the right of a shipper to demand transportation. This must be, since nothing in the duties of a common carrier by the remotest implication can be held to imply the power to sit in judgment on the title of the prospective shipper who has tendered goods for transporta-

tion. In fact, the want of foundation for the assertion of such a power is so obvious that in the argument at bar its existence is not directly contended for as an original proposition, but is deduced by implication from the supposed effect of some of the provisions of the second section of the act to regulate commerce. In substance, the contention is that as the section forbids a carrier from "charging a greater or less compensation for any service rendered or to be rendered in the transportation of persons or property, . . . than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," authority is to be implied for basing a charge for transportation upon ownership or non-ownership of the goods tendered for carriage, upon the theory that such ownership or non-ownership is a dissimilar circumstance and condition within the meaning of the section.

But this argument, in every conceivable aspect, amounts only to saying that a provision of the statute which was plainly intended to prevent inequality and discrimination has resulted in bringing about such conditions. Moreover, the unsoundness of the contention is demonstrated by authority. It is not open to question that the provisions of § 2 of the act to regulate commerce was substantially taken from § 90 of the English Railway Clauses Consolidation Act of 1845, known as the Equality Clause. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, 222. Certain also is it that at the time of the passage of the act to regulate commerce that clause in the English act had been construed as only embracing circumstances concerning the carriage of the goods and not the person of the sender, or, in other words, that the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either be-

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fore the service of the carrier began or after it was terminated. It was therefore settled in England that the clause forbade the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others. *Great Western R. Co. v. Sutton*, 1869—L. R. 4 H. L. 226; *Evershed v. London & N. W. Ry. Co.*, 1878—3 App. Cas. 1029, and *Denaby Main Colliery Co. v. Manchester &c. Ry. Co.*, 1885—11 App. Cas. 97. And it may not be doubted that the settled meaning which was affixed to the English Equality Clause at the time of the adoption of the act to regulate commerce applies in construing the second section of that act, certainly to the extent that its interpretation is involved in the matter before us. *Wight v. United States*, 167 U. S. 512; *Interstate Commerce Commission v. Alabama M. R. Co.*, 168 U. S. 144, 166.

As these considerations are decisive of the only legal question which, as we have already pointed out the case involves and also refute a subordinate contention that a forwarding agent is not a person within the meaning of that word as employed in the second section of the act to regulate commerce, we are brought, as we have hitherto said, to briefly refer to minor considerations pressed in argument, so far as they seem to us to be of sufficient weight to be entitled to particular notice.

First. It is urged that as the wide range of carload rates and the extent of the facility for combining articles for the purpose of obtaining such rates allowed in Official Classification territory are the result of the voluntary act of the railroads, therefore the power existed in the railroads to restrict and limit the enjoyment of such rate as was done by the assailed rules. In the interest of the public it is urged a limitation should not be now enforced which would compel the carrier to withdraw the facilities which shippers enjoy by the voluntary act of the carriers. But the proposition rests upon the fallacious assumption that because a carrier has the authority to fix rates it has

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the right to discriminate as to those who shall be entitled to avail of them. Moreover, the contention is not open for review, because the legal question of the right of the carrier to consider ownership under the second section having been disposed of, the finding of the Commission that to permit the enforcement of the rule would give rise to preferences and engender discriminations prohibited by the act to regulate commerce embodies a conclusion of fact beyond our competency to reëxamine.

Second. Conceding, for the sake of the argument, the correctness of the construction which we have given to the second section, it is urged that nevertheless, as a forwarding agent is a "dealer in railroad transportation," and depends for his profit in carrying on his business upon the sum which can be made by him out of the difference between the carload and the less than carload rate, and may discriminate between the persons who employ him, therefore the act to regulate commerce should be construed as empowering a carrier to exclude the forwarding agent as a means of preventing such discriminations. But in the absence of any statutory authority to exclude the forwarding agent, and basing the right to exclude merely upon the assumption that the nature and character of his business would produce discrimination, and therefore justify the exclusion, the contention is not open for our consideration, because, like the previous one, it is foreclosed by the finding of fact of the Commission. Indeed, this is not merely the result of an implication from the finding of the Commission, since it was affirmatively found that to permit the carrier to exclude the forwarding agent would be to produce preference and discrimination. The contention then comes to this—that carriers should be permitted to give preferences and make discriminations as a means of preventing those unlawful conditions from arising.

Third. It is said that as the business of the forwarding

agent is in a sense competitive with that of a carrier and may largely diminish the revenue derived by railroad companies from their less than carload rates, and hence cripple their ability to successfully conduct business, therefore the right to exclude the forwarding agent, even if there is no power to exclude the owner or the ordinary agent of owners, should be permitted. This, however, again, in a twofold sense, is directly in conflict with the findings of fact made by the Commission; first, because it disregards the findings as to the operation of the business of a forwarding agent, and, second, because it overlooks the express finding of the Commission that it would be so difficult, if not impossible, for the carrier to determine in practice the nature and character of the title of a person tendering goods for shipment that the necessary result of a rule excluding a forwarding agent would be to embarrass shipments by owners or their special agents, and thus beget universal uncertainty and constant discrimination and preference against owners.

As it follows, from the reasons just stated, that the court below erred in annulling the order of the Commission and enjoining its enforcement, its decree to that effect is reversed and the case is remanded with directions to dismiss the bill.